In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California,

Petitioner,

vs.

LOUIS NELSON, Warden, California State Prison at San Quentin,

Respondent.

BRIEF FOR RESPONDENT,

Joined In and Adopted by the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, and Wisconsin, The Territory of Guam, and The National District Attorneys' Association, Appearing as Amici Curiae.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Wilson v. Harris*, 378 F.2d 141 (9th Cir. 1967).

JURISDICTION

The jurisdiction of this Court arises under title 28, United States Code, section 1254(1). The petition for a writ of certiorari was granted on June 17, 1968. 392 U.S. 925.

STATUTES AND RULES INVOLVED

Relevant statutes and certain of the Federal Rules of Civil Procedure are set forth in the Appendix.

QUESTIONS PRESENTED

Does a United States District Court Judge have the authority to order the custodian-warden of a state prisoner to respond to discovery interrogatories served in a federal habeas corpus proceeding brought by the prisoner to challenge his state criminal conviction?

1. Is the use of discovery interrogatories in habeas corpus proceedings authorized by the "hearing" requirement of title 28, United States Code, section 2243, and the decisions of this Court?

2. Does a district court have the inherent power to authorize the use of discovery interrogatories in habeas corpus proceedings?

3. Does title 28, United States Code, section 1651(a), afford to a district court a basis for authorizing the use of discovery interrogatories in habeas corpus proceedings?

4. Do the provisions of Rule 33 of the Federal Rules of Civil Procedure, authorizing the use of discovery interrogatories, apply to proceedings in habeas corpus?

STATEMENT OF THE CASE

At the time that Alfred Walker, the real party in interest, initiated the habeas proceeding before the United States District Court in which he attempted to utilize the discovery-interrogatory procedures which are at issue herein, he was confined in the California State Prison at San Quentin, California, pursuant to a judgment and commitment of the Superior Court of the State of California for the County of Alameda, No. 35252 in the files of that court, dated December 10, 1963, and sentencing him to state prison for the term prescribed by law for the offense of possession of marijuana for sale. This judgment and commitment reflects two prior felony convictions.[1]

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[1]Since this proceeding was initiated the real party in interest has acquired a felony conviction for possession of marijuana. On November 27, 1967, he was convicted by jury in the Alameda County Superior Court and was subsequently sentenced to state prison. This conviction was based on an offense which occurred

Following this conviction, the real party in interest took an appeal to the California Court of Appeal for the First Appellate District. On October 15, 1964, that court filed an opinion affirming his conviction. A copy of that opinion, which is not published in the official reports, is attached as part of the appendix to this brief. The facts and circumstances upon which the conviction is based are reflected in the opinion of the California Court of Appeal as follows:

> "At approximately 12:30 p.m. on August 9, 1963, Edward Hilliard, an Oakland police officer attached to the Vice Control Section, received a telephone call from a female informant. The officer had known the informant, a special employee of the section, for two years. He considered her a reliable informant and testified that she had previously furnished him with information leading to the arrest and conviction of at least one person.
>
> "On this occasion, the informant reported that she had met a man who had just come to Oakland from San Francisco and who had five bags of marijuana for sale. Although she did not know the man's name, she stated that he had taken Room 3 at the Dunbar Hotel, and that he intended to sell the marijuana as soon as possible and return to San Francisco.
>
> "Upon receiving this information, Hilliard instructed the informant to meet him near the

after the District Court on May 15, 1967, ordered him released from state prison and placed under the jurisdiction of the federal probation office pending final disposition of his petition for federal habeas relief. Whether this new conviction with its concurrent sentence moots his habeas petition is not clear. *Peyton v. Rowe*, 391 U.S. 54 (1968), dealt with consecutive sentences.

Dunbar Hotel. He and Officer Walker then proceeded to the agreed location, furnished the informant with a $20 bill, the serial number of which had been recorded, and instructed her to go to Room 3 of the hotel and attempt to make a purchase of marijuana from the person in question. No attempt to search the informant was made.

"The informant then drove to the hotel in her own car, with the officers following at a distance in another car. She entered the hotel and remained out of sight of the officers for approximately five minutes. Upon emerging from the hotel, she got into her car and drove to a prearranged spot, with the officers following. She then gave Hilliard a brown paper bag containing a vegetable substance which he took to be marijuana. The informant stated that she had purchased the bag from the man who was in bed in Room 3. She further stated that he had taken it from a larger bag which was under the mattress and which contained several other small bags. The officers did not search the informant to see if she still had the $20 bill in her possession.

"The officers then returned to the Dunbar hotel, and Hilliard proceeded to Room 3 while Walker remained on the street where he could observe the window of said room. After Hilliard had knocked repeatedly on the door of the room without receiving any response, he went to the hotel manager's room to obtain a key. The manager then accompanied Hilliard and Walker to Room 3 and unlocked the door. Appellant was asleep in bed. Hilliard awakened him and identified himself as a police officer. Upon observing cer-

tain scars on the inside of appellant's elbows, Hilliard inquired as to their nature, and appellant replied that he had been using Percodan, a synthetic narcotic, for the last five days. Upon further questioning, he admitted that he had obtained the Percodan without a prescription. When asked whether he had Percodan or the equipment for injecting it in the hotel room, appellant replied in the negative, stating that he had used it up. The officer then asked if he could look around the room, and appellant replied, 'Sure, go ahead and look. There is nothing here.'

"After placing appellant under arrest for the illegal use of narcotics, Hilliard lifted the mattress on the bed and recovered a brown paper bag which contained four small bags, three cigarettes, and a package of wheat straw papers. The cigarettes and the contents of the four small bags were subsequently analyzed and found to be marijuana. When Hilliard showed these items to appellant, he stated that he had discovered the large bag under the mattress when he rented the room. When asked what he intended to do with it, he replied that he wanted to sell it to make some money. Although appellant was searched by the officers, the $20 bill which had been given to the informant was never found."

On his appeal the real party in interest challenged the search which produced the narcotics which were introduced in evidence against him during his trial in the superior court. That issue was resolved by the California Court of Appeal as follows:

"Appellant does not challenge the sufficiency of the evidence, but contends that the judgment

should be reversed because evidence that was obtained by an illegal search and seizure was erroneously admitted. He asserts, more specifically, that he never gave his free and voluntary consent to the search of his hotel room, and that said search cannot be deemed incidental to a lawful arrest because the police lacked reasonable cause for such arrest and relied solely upon information supplied by an informant who was not searched before and after she allegedly purchased marijuana from appellant and who was not kept under constant surveillance so as to exclude the possibility of her having obtained it from another source.

"This argument is wholly without merit, and is apparently based upon the erroneous assumption that evidence of information supplied by an informant cannot constitute reasonable cause for an arrest unless such evidence is in itself sufficient to support a conviction.

"It is settled that information from a reliable informant is sufficient to sustain a finding that an arrest was made with reasonable cause and that such information need not be confined to evidence which would be admissible at the trial on the issue of guilt. (*People v. Prewitt* (1959) 52 Cal.2d 330, 337; *People v. Gonzalez* (1956) 141 Cal.App.2d 604, 606; *Trowbridge v. Superior Court* (1956) 144 Cal.App.2d 13, 17.) In the present case, Officer Hilliard testified that the informant had served as a special employee of the Oakland Police Department for two years, that he considered her reliable, and that she had in the past provided information which led to the arrest and conviction of at least one person. Under such

circumstances, the officer's failure to search her before and after she entered the hotel and to keep her under surveillance at all times did not render valueless the information furnished by her. In view of her known reliability, the officer was clearly justified in believing the information which she gave him and in arriving at the reasonable conclusion that the occupant of Room 3 was offering marijuana for sale. Since the officer accordingly had reasonable cause for arresting appellant (Pen. Code, § 836), it follows that a search incidental to such arrest was entirely proper (*People v. Dixon* (1956) 46 Cal.2d 456, 458-459), and it is unnecessary to determine whether appellant freely consented thereto." (Footnote omitted.)

On November 22, 1965, the real party in interest filed an application for habeas corpus relief with the United States District Court for the Northern District of California in which he challenged the validity of his confinement at San Quentin State Prison under this 1963 conviction in the Alameda County Superior Court. The principal issue presented by his application related to the validity of the search which produced the evidence used against him in his state trial. The District Court issued an order to show cause on the same date. A return to the order to show cause was filed on December 21, 1965, and on March 16, 1966, the District Court appointed counsel to represent petitioner, noting in that order that it appeared that an evidentiary hearing might be required. On August 15, 1966, counsel for the real party in interest

moved for and was granted an order directing an evidentiary hearing to resolve various issues relating to the validity of the conviction. The salient issue presented by his motion related to the validity of the search and in particular the reliability of the informant.

On October 20, 1966, at a time when the evidentiary hearing in the habeas proceeding was set for October 28, 1966, counsel for the real party in interest served upon counsel for the warden a set of interrogatories directed to the reliability of the informant (A 34-35). For example, he asked that the warden detail the previous instances in which the informant had suppied information to the arresting officer which formed the basis for an arrest or search. In a prefatory paragraph he asked that the warden "answer under oath, in writing, in accordance with Rules 33 and 81(a)(2) of the Federal Rules of Civil Procedure, each of the interrogatories set forth" (A 34).

On October 21, 1966, there came on for hearing before the District Court an application submitted by counsel for the real party in interest for an order shortening the time within which the warden could respond to or object to the interrogatories. At the same hearing the warden presented objections to the interrogatories on the grounds that interrogatories for purposes of discovery are not authorized in a federal habeas proceeding (A 36-38). The District Court denied the warden's objections to the interrogatories and directed him to answer them on or before October 26, 1966 (A 39).

On October 26, 1966, the warden submitted to the United States Court of Appeals for the Ninth Circuit an application for mandamus and/or prohibition, and that court issued an order the same day, staying the District Court from enforcing the order directing the warden to answer the interrogatories; and directing the District Court to show cause why a writ of mandamus and/or prohibition should not issue.

Thereafter, the matter was briefed and argued before the Court of Appeals. On May 10, 1967, the Court of Appeals filed its opinion which vacated the District Court order authorizing the interrogatories directed to the warden. *Wilson v. Harris,* 378 F.2d 141 (9th Cir. 1967) (set out in A 40-44).

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that neither the Habeas Corpus Act nor the Federal Rules of Civil Procedure, separately or together, authorize a federal district court judge to order the custodian-warden of a state prisoner to respond to discovery interrogatories served in the prisoner's federal habeas corpus proceeding.

I. In his brief before this Court, petitioner presents four distinct and separate arguments: that authority to order such discovery interrogatories is implicit in the hearing requirement of title 28, United States Code, section 2243; that a district court has inherent power to authorize such discovery; that such

discovery is authorized by the All Writs Statute; and that such discovery is authorized by the Federal Rules of Civil Procedure. The first three issues were not raised in the Court of Appeals. Furthermore, the third was brought into the case after certiorari was granted. This Court, since it functions as a court of review, should disregard these three issues.

II. Discovery interrogatories in habeas corpus are not authorized either by the "hearing" requirement of section 2243 or by decisions of this Court. Section 2243 does not give a district court a carte blanche in habeas corpus, for these proceedings are regulated by statute. Section 2246 limits the use of depositions and interrogatories to evidentiary purposes. Since discovery is a significant procedural innovation tantamount to a substantive doctrine, such a radical change in habeas proceedings cannot be effected without a definite congressional sanction. Nor has discovery in federal habeas been authorized by any opinion of this Court.

Petitioner's paradoxical claim that prisoners must "speculate" as to the defects in their convictions and suffer "surprise" if denied discovery in aid of their petitions is but circular reasoning. Section 2242 requires the applicant to allege the facts under oath. If he can only "speculate," then he has no basis for filing a petition in the first place. Nothing in the Habeas Corpus Act even remotely suggests a congressional intention to authorize court-sanctioned fishing expeditions in hopes of finding some defect. Since such discovery procedure is not available to a pre-

sumptively innocent defendant pending criminal trial in federal or state courts, it is eminently reasonable to deny its use to a prisoner confined pursuant to a presumptively valid conviction.

III. A district court does not have "inherent power" to authorize discovery interrogatories in a habeas corpus proceeding. The inferior courts of the United States are created by statute and have no inherent powers. Though they have the power, implicit in their office, to regulate internal administrative procedure and decorum, discovery is neither. The implementation of discovery techniques is of such momentous import as to require exacting observance of the limitations upon the judicial rule-making power. This is especially true in habeas corpus where procedure has been traditionally governed by statute.

IV. The "all writs" statute does not provide a district court with a basis for authorizing discovery interrogatories in a habeas corpus proceeding. A prisoner has no right to require that he be informed concerning possible shortcomings or defects in his conviction. Nor can mandamus establish that duty, for the function of that writ is to compel performance of an existing duty, not to create a new one. A subpoena *ad testificandum* cannot be used for discovery since it only requires the witness to appear at trial, not before. The subpoena *duces tecum* is similarly inappropriate since it only compels the witness to produce documents at trial. Had such traditional writs been suitable for discovery, none of the discovery rules now in force would have been necessary.

Nor can these traditional writs be "expanded" to the point of unrecognizable mutation. The judicial writ power is confined within the congressional framework established to regulate the proceeding in which that power is exercised. The "all writs" statute does not give a district judge license to thwart the congressional policy set out in the Habeas Corpus Act.

V. When the legislative history of Rule 81(a)(2) is examined, it becomes apparent that the framers of the Civil Rules intended them to have only a very limited applicability to habeas corpus proceedings. The discovery provisions of the Federal Rules of Civil Procedure were never intended to apply.

Rule 81(a)(2) sets out two conditions which must be met before a particular rule can be extended to habeas corpus. Neither criterion can be met with respect to the rules relating to discovery. The first cannot be satisfied because the practice insofar as depositions and interrogatories are concerned is set forth in the Habeas Corpus Act, which restricts them to evidentiary purposes. The second condition cannot be met because discovery was not part of habeas practice prior to adoption of the Civil Rules. No cases or texts suggest that discovery was available in habeas. Indeed, discovery was not available in any federal actions other than suits in equity, and equity rules were inappropriate to habeas corpus.

ARGUMENT

I

PETITIONER CANNOT NOW RAISE QUESTIONS WHICH WERE NEITHER PRESENTED TO THE COURT OF APPEALS NOR CONTAINED IN THE PETITION FOR CERTIORARI.

The interrogatories which the real party in interest served upon respondent in the District Court were propounded "in accordance with Rules 33 and 81(a)(2) of the Federal Rules of Civil Procedure" (A 34). In *Wilson v. Harris,* 378 F.2d 141 (9th Cir. 1967) (reprinted in A 40-44), the only issues presented to the Court of Appeals were whether the discovery-interrogatory procedures of Rules 26 and 33 were inapplicable to habeas corpus proceedings pursuant to Rule 81(a)(2), and whether interrogatories for the purpose of discovery were authorized by title 28, United States Code, section 2246. In the petition for certiorari, the decision of the Court of Appeals was challenged on the grounds that discovery was authorized by the "hearing" requirement of title 28, United States Code, section 2243, and the decisions of this Court (Petition, pp. 3-5), that the interpretation of Rule 81(a)(2) was erroneous (Petition, pp. 5-8), and that the holding annulled the inherent powers of the district courts (Petition, pp. 8-9).

In urging that the District Court had the power to order discovery interrogatories in a habeas corpus proceeding, petitioner now makes the following claims in his brief:

(a) Discovery is authorized by the "hearing" requirement of title 28, United States Code, sec-

tion 2243, and the decisions of this Court (Petitioner's Brief, pp. 6, 8-12);

(b) A district court has the inherent power to order discovery (Petitioner's Brief, pp. 6, 12-18);

(c) Discovery may be ordered under title 28, United States Code, section 1651(a) (Petitioner's Brief, pp. 6-7, 18-22); and

(d) Rule 81(a)(2) does not render the discovery-interrogatory procedures of the Federal Rules of Civil Procedure inapplicable to proceedings in habeas corpus (Petitioner's Brief, pp. 7, 23-35).

Of these four issues, the first three were not raised either in the District Court or the Court of Appeals. Pursuant to the rules and in accordance with the prior decisions of this Court, these three claims should not be considered.

This Court has steadfastly adhered to the proposition that it is a court of review and will not determine questions neither decided by nor submitted to the court below. *Lawn v. United States,* 355 U.S. 339, n. 16 at 362-63 (1958); *Duignan v. United States,* 274 U.S. 195, 200 (1927). "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn v. United States, supra,* 355 U.S., n. 16 at 362; accord, *Duignan v. United States, supra.* There are no exceptional circumstances here. Compare *United Brotherhood of Carpenters v. United States,* 330 U.S. 395, 412 (1947) cited in *Lawn v. United States, supra; Ashcraft v. Tennessee,* 322 U.S. 143,

155-56 (1943); *Watts, Watts & Co. v. Unione Austriaca di Navigazone,* 248 U.S. 9, 21 (1918). Because petitioner failed to raise them below, the first three questions in his brief should not be considered.

There is still another reason why this Court should not examine the third issue now presented in the petitioner's brief. Supreme Court Rule 23(1)(c) provides that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." The rule has been uniformly invoked when the petitioner's brief raises questions not found in the petition. *Namet v. United States,* 373 U.S. 179, 190 (1963); *Phillips Chemical Co. v. Dumas Independent School Dist.,* 361 U.S. 376, n. 12 at 387 (1960); *Local 1976, Carpenter's Union v. NLRB,* 357 U.S. 93, n. 1 at 96 (1958); *Lawn v. United States,* 355 U.S. 339, n. 16 at 363 (1958); *Irvine v. California,* 347 U.S. 128, 129 (1954); *cf. Neely v. Eby Constr. Co.,* 386 U.S. 317, n. 3 at 321 (1967).

Nor can petitioner evade the requirements of Rule 23(1)(c) by claiming that the third question was "fairly comprised" in the petition for certiorari. The petition raised a single question: "Is a United States District Court Judge without jurisdiction to order discovery by way of written interrogatories in habeas corpus proceedings?" (Petition, p. 1) Petitioner did not rely upon title 28, United States Code, section 1651(a), but instead invoked the "inherent power" of the courts, the Federal Rules of Civil Procedure, and claimed that discovery was necessary for a meaningful hearing (Petition, pp. 3-9). Certainly a petitioner

cannot be permitted to raise every conceivable claim of error merely by positing a single, broad question which assumes the form: "Should the decision be reversed?" Such a practice conforms neither to the letter nor the spirit of Rule 23. A petitioner must be limited to those issues arising out of the questions presented in his petition, as those questions are framed through the arguments made in support of that petition under Rule 23(1)(h). Anything less reduces the petition to the office of a stalking-horse, and promises this Court a litter of pigs in every poke. In *Irvine v. California,* 347 U.S. 128, 129 (1954), this Court declared, "We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition. . . ." Since petitioner now attempts the same maneuver condemned in *Irvine,* he should be similarly limited to those questions actually contained in his petition for certiorari and this Court should decline consideration of the third question presented in his brief.

II

AUTHORIZATION FOR DISCOVERY INTERROGATORIES IN HABEAS CORPUS CANNOT BE FOUND IN THE "HEARING" REQUIREMENT OF SECTION 2243.

Petitioner claims that discovery interrogatories in habeas corpus are authorized by the "hearing" requirement of title 28, United States Code, section 2243, as that requirement has been interpreted by decisions of this Court (Petitioner's Brief, pp, 6, 8-12). The portion of section 2243 upon which he relies states: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." It is his contention that implicit in this provision is an authorization for district courts to order discovery to make such hearings more "meaningful." Assuming, *arguendo,* that petitioner may here broach this issue for the first time, the proposition is without credible foundation.

Section 2243 does not give a district court a carte blanche in habeas corpus proceedings. Nor do the decisions of this Court permit a district judge to create his own procedural devices, for it has been repeatedly acknowledged that proceedings in federal habeas corpus are confined within the framework of the statutory scheme. *Brown v. Allen,* 344 U.S. 443, 460-61 (1953); *Holiday v. Johnston,* 313 U.S. 342, 350-51 (1941); *Walker v. Johnston,* 312 U.S. 275, 283-84 (1941).

A. The Habeas Corpus Act authorizes the use of depositions and interrogatories only for evidentiary purposes.

Congress has established definitive guidelines which control the district courts in conducting evidentiary hearings. 28 U.S.C. §§ 2245-49 (1964). Section 2246 provides:

> "On application for a writ of habeas corpus evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

This section was designed to facilitate the presentation of reliable evidence. The history of the writ reveals that one of the most common forms of evidence presented to the federal courts was the affidavit. W. CHURCH, HABEAS CORPUS §§ 207-20 (2d ed. 1893). Since these affidavits were taken ex parte and were not subject to the scrutiny of cross-examination, they were considered of dubious value in determining factual issues. *Id.*, § 207. It is evident from the comments of those persons who wrote section 2246 that the provisions for interrogatories was intended to remedy the defective nature of an ex parte affidavit. Senator Alexander Wiley of the Senate Committee on the Judiciary revealed this rationale for the provision: "The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits *with proper safeguards.*" S. Rep., No. 1527, 80th Cong., 2d Sess. 2 (1948) (emphasis added). The Honorable John J. Parker, Chairman of the Judicial Conference Committee which drafted the Habeas Corpus Act, de-

clared, "Section 2246 provides for the use of affidavits in hearings with the right to the opposite party to propound written interrogatories to the affiants or file answering affidavits." Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171, 174 (1949). Other commentaries also indicate that the statutory procedures were restricted to depositions or interrogatories taken for the purposes of evidence. The Honorable Clarence G. Galston, a member of the Judicial Conference Committee on Revision of the Judicial Code, observed, "Section 2246 likewise is intended to clarify existing practice in respect to the taking of evidence, orally or by depositions. . . ." Galston, *An Introduction to the New Federal Judicial Code,* 8 F.R.D. 201, 205 (1949). George Longsdorf, a consultant to the Advisory Committee on Revision of the Federal Criminal Code and a member of the Advisory Committee on the Federal Rules of Criminal Procedure, also regarded the section as pertaining to matters of evidence: "§ 2246 provides for taking evidence upon the application orally or by deposition." Longsdorf, *The Federal Habeas Corpus Acts Original and Amended,* 13 F.R.D. 407, 418 (1953). On the basis of these authorities, then, it becomes apparent that the proper interpretation[2] of section 2246 was made in *Sullivan*

[2]A wholly erroneous construction of this provision was made in *Knowles v. Gladden,* 254 F.Supp. 643 (D. Ore. 1965). In that case, Judge Kilkenny observed that section 2246 was not enacted until ten years after Federal Rule of Civil Procedure 81(a)(2) had become effective. *Id.,* n. 3 at 254 and accompanying text. He therefore concluded that "deposition," as used in section 2246, must be given the "well known legal meaning" which he felt appeared in the Federal Rules, to include depositions for purposes of discovery. *Id.* at 644-45. But the "well known legal meaning" of "deposition" hardly equates "deposition" with "depo-

v. United States, 198 F.Supp. 624, 626 (S.D.N.Y. 1961):

> "The provision for deposition evidence in the first sentence of that statute relates, again, not to the discovery depositions (which may be oral or by interrogatories) but to depositions intended to be used as testimonial evidence at a hearing upon the habeas corpus application. The deposition contemplated is that of a specified witness upon an open commission."

Section 2246 thus assures the admission of trustworthy evidence, for: (1) evidence can always be tested if presented orally, since the witness is before the court and subject to cross-examination; (2) evidence can be tested if offered in deposition form, since the deposition can be taken only upon notice to the adverse party who then has an opportunity to cross-examine the deponent; and (3) evidence can be tested when submitted in affidavit form, since the adverse party has the "right to propound written interrogatories to the affiants, or to file answering affidavits."

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sition for purposes of discovery." A deposition is merely a written statement taken under oath and upon notice to an adverse party, thus permitting the opponent to test the testimony via cross-examination or its equivalent. BALLENTINE'S LAW DICTIONARY 240 (2d student ed. 1931); BLACK'S LAW DICTIONARY 527 (4th ed. 1951). Even the rules themselves note that depositions may be used "for the purpose of discovery or for use as evidence in the action or for both purposes." FED. R. CIV. P. 26(a). This qualification would have been unnecessary if "deposition" had the "well known legal meaning" attributed to it by Judge Kilkenny.

Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967), affirms the district court's subsequent denial of the petition, not the decision on the discovery motion discussed above. This was apparently overlooked by petitioner (see Petitioner's Brief, pp. 16, 23, 31).

The limitation of depositions and interrogatories to matters of evidence by section 2246 is highly significant. Section 2246 was enacted in 1948, almost ten years after the Federal Rules of Civil Procedure were adopted. Had Congress deemed it wise to permit the use of these procedures for purposes of discovery, it would have been a simple task to add "for the purpose of discovery or for use as evidence" as was done in Rule 26(a). The failure to do so indicates that discovery procedures in habeas corpus proceedings were not authorized by Congress. Compare *Holiday v. Johnston,* 313 U.S. 342, 353 (1941). Similarly, the exemption of habeas corpus proceedings from the coverage of the Federal Rules under Rule 81(a)(2) also suggests that discovery was not envisioned in habeas corpus. Compare *Miner v. Atlass,* 363 U.S. 641, 648 (1960).

B. Discovery is a significant innovation which should not be extended to habeas corpus without special congressional authorization.

Not only do Rule 81(a)(2), section 2246, and the statutory framework of the Habeas Corpus Act forbid inferring discovery authorization from the "hearing" requirement of section 2243, but the significance of the discovery procedures themselves militate against it. This Court has observed that the discovery mechanism under Rules 26 to 37 "is one of the most significant innovations of the Federal Rules of Civil Procedure." *Hickman v. Taylor,* 329 U.S. 495, 500 (1947), quoted in *Miner v. Atlass,* 363 U.S. 641, 649 (1960). In *Miner v. Atlass, supra,* 363 U.S. at 649-50,

this Court emphasized the momentous nature of the "weighty and complex" matter of discovery:

> "'[T]he choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less significant than the initial decision to have such a system. It should be obvious that we are not here dealing either with a bare choice between an affirmative or negative answer to a narrow question, or even less with the necessary choice of a rule to deal with a problem which must have an answer, but need not have any particular one. Rather, the matter is one which, though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine. . . ."

This Court has previously refused to effect a significant change in habeas corpus "in the teeth" of statutory language suggesting otherwise. *Fay v. Noia,* 372 U.S. 391, 435 (1963). Similarly, in considering another proposal, this Court declared, "We are unwilling to conclude without a definite congressional direction that so radical a change was intended." *Brown v. Allen,* 344 U.S. 443, 450 (1953). In *Brown v. Allen, supra,* it was also noted that the suggestion "does not square with the other statutory habeas corpus provisions." Since the discovery proposed by petitioner does not square with section 2246 and would work a radical change in the face of that section, it is impermissible to infer discovery authorization from so tenuous a basis as the "hearing" requirement of section 2243.

C. No warrant for the use of discovery in habeas proceedings can be found in decisions of this Court.

Petitioner also relies upon the following sentence, which appears in footnote 19 of *Brown v. Allen, supra,* 344 U.S. at 464: "Of course, the other usual methods of completing a record in civil cases, such as a subpoena *duces tecum* and discovery, are generally available to the applicant and respondent." Yet whether discovery was applicable to proceedings in habeas corpus was neither at issue nor even discussed in the case, and the footnote cited no authority whatever for such a proposition. This Court has previously cautioned against assuming that habeas corpus procedures not at issue and "passed without notice" have been sanctioned. *Holiday v. Johnston,* 313 U.S. 342, 352 (1941). Consequently, the passing reference to discovery in footnote 19 is hardly authority for a radical and momentous change in habeas corpus procedure.

Nor does anything this Court said in *Townsend v. Sain,* 372 U.S. 293 (1963), suggest that civil discovery procedures are available in federal habeas proceedings. *Townsend* dealt solely with the power and duty of federal courts to conduct evidentiary hearings upon petitions submitted to them by state prisoners, not with procedural matters such as discovery. In discussing the scope of the district court's "plenary" power, this Court stated:

> "The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for

> a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power *to receive evidence and try the facts anew.*" *Id.* at 312 (emphasis added).

The "plenary" power is thus the "power of the federal courts to take testimony and determine the facts *de novo* . . . ." *Id.* at 311. *Townsend* provides no authority for the proposition that a district judge has the power to create whatever procedural devices he feels may be appropriate. To paraphrase this Court in *Townsend v. Sain, supra* at 312, the language of Congress, the history of the writ, and the decisions of this Court all make clear that the power of the district judge over habeas procedure is not absolute. See 28 U.S.C. §§ 2245-47, 2249, 2254(d); *Holiday v. Johnston,* 313 U.S. 342, 351-54 (1941); *Walker v. Johnston,* 312 U.S. 275, 284-87 (1941). Nothing in the Habeas Corpus Act suggests that the district courts have the power to fashion discovery procedures for habeas corpus proceedings. Contrary to petitioner's claim, *Townsend v. Sain, supra,* provides no such authority.

D. Discovery would not enhance the reliability of the fact-finding process and would defeat the summary hearing provisions of the Habeas Act.

Lastly, petitioner claims that, "Only through such interrogatories can surprise to the parties and the Court be avoided, and litigation of the issues proceed on the basis of fact rather than speculation" (Petitioner's Brief, p. 12). This is indeed an astounding

and self-contradictory paradox. The Habeas Corpus Act requires the petitioner to allege under oath the facts upon which he relies for relief. 28 U.S.C. § 2242 (1964). These allegations must establish a prima facie case before an order to show cause may be issued. *Brown v. Allen,* 344 U.S. 443, 502 (1953) (concurring opinion of Frankfurter, J., joined by majority of Court). At the hearing, the petitioner bears the burden of sustaining his allegations by a preponderance of the evidence. *Walker v. Johnston,* 312 U.S. 275, 286 (1941). Thus petitioner's basis for discovery creates an irreconcilable conflict with the statutory requirements, for if the applicant can only "speculate" as to whether the proceedings culminating in his detention were constitutionally defective, then he has no basis whatsoever for filing a petition in the first place. This absurdity creates a procedural impossibility. If he can only "speculate" as to the facts which might vitiate his detention, he cannot file a petition. 28 U.S.C. § 2242 (1964); *Brown v. Allen, supra,* 344 U.S. at 502 (concurring opinion of Frankfurter, J., joined by majority of Court). But if he cannot file a petition, he cannot ask for discovery.

These same statutory requirements also demonstrate the inapplicability of discovery to habeas proceedings, for they effect the congressional requirement that a prisoner must base his claim of unlawful detention upon facts within his knowledge. Nothing in the statutory framework even remotely suggests that Congress intended the Habeas Corpus Act to provide every prisoner with an unlimited opportunity to en-

gage in court-sanctioned fishing expeditions in hopes of finding some defect underlying his detention.[3] The allegation and verification requirements of section 2242 compel the conclusion that discovery contravenes those precepts at the very roots of the Habeas Corpus Act.

Nor would discovery be likely to enhance the reliability of the fact-finding process—in fact, the contrary is the only realistic forecast. This Court has previously noted that few habeas corpus petitioners ever sustain their allegations and secure a writ. *Fay v. Noia,* 372 U.S. 391, 440 (1963); *Brown v. Allen,* 344 U.S. 443, 510 (1953) (concurring opinion of Frankfurter, J., joined by majority of Court). Congress has also observed that the writ is frequently abused and that the petitioners are seldom successful. H.R. REP., No. 1892, 89th Cong., 2d Sess. 5 (1966). The attitude of many members of the bench concerning the veracity of habeas petitioners was expressed by Judge Duniway, concurring in *Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir.), cert. denied, 372 U.S. 845 (1963), where he observed:

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[3]Such license does not exist in federal criminal trials, and this Court has refused to permit a criminal defendant to engage in a "broad or blind fishing expendition . . . on the chance that something . . . might turn up." *Gordon v. United States,* 344 U.S. 414, 419 (1953); accord, *Jencks v. United States,* 353 U.S. 657, 666-67 (1957). Even California, with its extremely liberal approach to permitting discovery by a criminal defendant, has refused to allow depositions or interrogatories for discovery purposes. *Clark v. Superior Court,* 190 Cal.App.2d 739, 12 Cal.Rptr. 191 (1961); *People v. Lindsay,* 227 Cal.App.2d 482, 510-11, 38 Cal.Rptr. 755 (1964), limited on unrelated issue, *People v. Haston,* 69 A.C. 237, n. 22 at 255, 444 P.2d 91, n. 22 at 102-03, 70 Cal.Rptr. 419, n. 22 at 430-31 (1968).

> "We know from sad experience with habeas corpus and 2255 cases that imprisoned felons are seldom, if ever, deterred by the penalties of perjury. They do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court."

If petitioners could utilize discovery techniques to learn the information still available to the state concerning their case, it would undermine the reliability of the fact-finding process. An experienced petitioner would be enabled to tailor the allegations of his traverse and to testify at an evidentiary hearing so as to avoid contradictions otherwise impeaching or rebutting his claims. Discovery would thus open new avenues for abuse since a crafty petitioner could perjure himself with virtual impunity.[4] As Judge Murphy remarked in *Sullivan v. United States*, 198 F. Supp. 624, 626 (S.D.N.Y. 1961), "[T]he remedy has been subject to flagrant abuse, . . . and to our

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[4]The problems and abuses multiplied by opening this Pandora's box do not end with fabrication and falsification. A vindictive petitioner would no doubt revel in this additional opportunity to harass and annoy whomsoever he might choose among those law enforcement officials, officers of the court, and judges who are directly or even remotely connected with the facts and circumstances culminating in his imprisonment. This malicious tendency among prisoners has often been noted in other areas. See, *e.g.*, *Carey v. Settle*, 351 F.2d 483, 484 (8th Cir. 1965); *Allison v. Wilson*, 277 F.Supp. 271, 272 (N.D. Cal. 1967); *Urbano v. Sondern*, 41 F.R.D. 355, 358 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1966). Some prisoners look upon their access to the courts as a cathartic or sublimit game. See *Allison v. Wilson, supra; Urbano v. Sondern, supra.* Furthermore, to extend discovery to habeas corpus cases requires the federal government to underwrite the costly deposition process—something which Congress has confined to evidentiary depositions. 28 U.S.C. § 2246 (1964). Lastly, discovery against prisoners raises serious problems in view of the right against self-incrimination.

minds, such abuse would be multiplied a hundredfold were the 'open sesame' civil discovery rules held applicable thereto."

This abuse factor is magnified—and the unsuitability of civil discovery techniques in habeas is demonstrated—when it is recalled that discovery may be initiated when suit is filed. Thus a petitioner could serve a number of deposition notices and interrogatories even before his petition has been examined by a federal judge and a decision made as to whether to issue an order to show cause. In an ordinary civil case, the use of discovery devices by attorneys is restrained by a desire to hold litigation costs down. Habeas petitioners would seldom be deterred by costs since they generally proceed *in forma pauperis* at government expense. The only way for the state to avoid having to respond to even the most patently frivolous or irrelevant discovery demand is by filing objections and appearing at the hearing thereon. The prospect of immersing the representatives of the state in a flood of absurd demands and bogging down the courts with hearings on objections thereto would no doubt appeal to many prisoners. *Cf. Weller v. Dickson,* 314 F.2d 598, 601-02 (9th Cir. 1963) (concurring opinion). The burden upon the federal judiciary and state attorneys would be intolerable.

The admonition in section 2243 to "summarily hear and determine the facts" itself persuasively contravenes petitioner's assertion that civil discovery procedures should be available in habeas proceedings. Any practitioner with experience in civil litigation must rec-

ognize that discovery results in delay. It often becomes a Fabian tactic utilized to harass the opponent and postpone trial. The delay inherent in the discovery process is inconsistent with the summary determination of a habeas petition envisioned in section 2243.

Finally, it is incongruous to give state prison inmates who submit federal habeas petitions civil discovery devices which are not available to presumptively innocent defendants in criminal prosecutions in federal or state courts. As Judge Merrill noted in *Wilson v. Weigel,* 387 F.2d 632, 634 (9th Cir. 1967):

> "To deny criminal discovery at the time of trial only to grant it in post-conviction proceedings seems to us to make little sense. . . . Such a holding could completely destroy finality of state court criminal judgments and render state proceedings mere preliminaries to the unlimited factual exploration available for the first time in federal habeas corpus." (Footnote omitted.)

E. Whether discovery should be extended to habeas proceedings should be left to Congress.

To some, discovery in habeas corpus might seem both reasonable and advantageous, but to others it appears wholly unsuitable. Discovery is a matter which requires the "mature consideration of informed opinion from all relevant quarters. . . ." *Miner v. Atlass,* 363 U.S. 641, 650 (1960). In view of the comprehensive statutory scheme, the clear limitations upon interrogatories and depositions set out in the Habeas Act, and the drastic change this innovation would work upon habeas procedure, the following

observation from *Holiday v. Johnston,* 313 U.S. 342, 352 (1941), wherein this Court found Rule 53 inapplicable to habeas corpus, is particularly appropriate:

> "It may be that the practice is a convenient one, but, if so, that consideration is for Congress. In view of the plain terms in which the Congressional policy is evidenced in the Habeas Corpus Act, the courts may not substitute another more convenient mode of trial."

III

THE DISTRICT COURT DID NOT HAVE "INHERENT POWER" TO AUTHORIZE DISCOVERY INTERROGATORIES IN A HABEAS CORPUS PROCEEDING.

Petitioner asserts that a district court has the "inherent power" to order discovery through interrogatories in a habeas corpus proceeding (Petitioner's Brief, pp. 6, 12-18). As authority for this postulation, he relies upon three decisions which purport to invoke the "inherent power" of the court to grant limited discovery in criminal cases,[5] a decision which presupposes the existence of "inherent power,"[6] two

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[5] *United States v. Nolte,* 39 F.R.D. 359 (N.D. Cal. 1965) (opinion of petitioner herein); *United States v. Williams,* 37 F.R.D. 24 (S.D.N.Y. 1965); *United States v. Taylor,* 25 F.R.D. 225, 228 (E.D.N.Y. 1960). None of these cases purported to extend general discovery to defendants—something which this Court has also refused to do. See note 3, *supra.* The 1966 amendment to Federal Rule of Criminal Procedure 16 has extended the scope of discovery, but has not authorized an unlimited discovery.

[6] *Shores v. United States,* 174 F.2d 838, 845 (8th Cir. 1940). The discussion was limited to the court's control over the defendant's confession, which "would seem to be different inherently than as to the ordinary elements of the Government's case." *Ibid.*

decisions which mentioned "inherent power" in passing,[7] and a section 2255 case where "inherent power" was utilized to provide the petitioner with certain medical records.[8] Assuming that petitioner can now urge "inherent power" as a basis for reversal, it is clear that a district court does not have the "inherent power" to order discovery in habeas corpus proceedings.

Well over a century ago, in *Cary v. Curtis,* 44 U.S. (3 How.) 235, 244-45 (1845), this Court observed that the inferior courts of the United States are creatures of statute, that they are limited in authority, and that they have no inherent powers:

> "'[T]he judicial power of the United States although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

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[7] *United States v. Murray,* 297 F.2d 812, n. 7 at 821-22 (2d Cir.), cert. denied, 369 U.S. 828 (1962); *United States v. Rothman,* 179 F.Supp. 935, 938 (W.D. Penn. 1959).

[8] *Sullivan v. United States,* 198 F.Supp. 624, n. 2 at 626 (S.D. N.Y. 1961). No issue was raised as to such a power since the United States consented to production of the records. It is also important to note that the district judge in *Sullivan* specifically held that civil discovery rules did not apply to proceedings in the nature of habeas corpus. *Id.* at 626.

> To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows then, that the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. *The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.*" (Emphasis added.)

In *Miner v. Atlass,* 363 U.S. 641 (1960), a contention almost identical to that of petitioner herein was rejected by this Court. Relying upon *Cary v. Curtis, supra,* it was held that a court of admiralty did not have inherent power, independent of any statute or rule, to order the taking of depositions for the purpose of discovery. *Id.* at 643-44.

In *Miner,* it was also claimed that the district court could formulate a rule permitting discovery deposi-

tions under Rule 44 of the General Admiralty Rules (simliar to Rule 83 of the Federal Rules of Civil Procedure).[9] But this Court stated:

> "As we have noted, the determination of this Court in 1939 to promulgate some but not all of the Civil Rules relating to discovery must be taken as an advertent declination of the opportunity to institute the discovery-deposition procedure of Civil Rule 26(a) throughout courts of admiralty. . . .
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> ". . . .
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> "We deal here only with the procedure before us and our decision is based on its particular nature and history. Discovery by deposition is at once more weighty and more complex a matter than either of the examples just discussed or others that might come to mind. Its introduction into federal procedure was one of the major achievements of the Civil Rules, and has been described by this Court as 'one of the most significant innovations' of the rules. *Hickman v. Taylor,* 329 U.S. 495, 500. Moreover, the choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less significant than the initial decision to have such a system. It should be obvious that we are not here dealing either with a bare choice between an affirmative or a negative answer to a narrow question, or even less with

[9]The ruling of the District Court herein was on even more tenuous ground than that of the court in *Miner.* In *Miner,* the discovery procedure had been permitted by the district courts as a unit ("majority of the judges") as required by Admiralty Rule 44. In the present case, no effort to comply with Rule 83 was made for the discovery procedure emanated from a single judge acting alone.

> the necessary choice of a rule to deal with a problem which must have an answer, but need not have any particular one. Rather, the matter is one which, though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine, and which arises in a field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed.
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> "The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U.S.C. § 331 (advisory function of Judicial Conference), 28 U.S.C. § 2073 (Prior report of proposed rule to Congress [in admiralty cases]), designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress as would now be required under 28 U.S.C. § 2073." *Miner v. Atlass, supra,* 363 U.S. at 648-50 (footnotes omitted).

This cogent reasoning applies with equal force to the present case and compels the conclusion that no district court can provide procedures in habeas corpus cases by a mystical incantation of "inherent powers."

Petitioner attempts to distinguish *Miner* by citing several cases for the proposition that district courts have traditionally permitted discovery in habeas corpus (Petitioner's Brief, p. 16). But none of those cases relied upon a "traditional discovery practice" in habeas proceedings and all were decided long after the Civil Rules had been adopted. *Sullivan v. Dickson,* 283 F.2d 725, 727 (9th Cir. 1960), cert. denied, 366 U.S. 951 (1961), and *Smith v. United States,* 174 F. Supp. 828, 830, 835 (S.D.Cal. 1959), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960), assumed that the Federal Rules of Civil Procedure applied to habeas corpus. *Schiebelhut v. United States,* 318 F.2d 785, 786 (6th Cir. 1963), and *United States ex rel. Seals v. Wiman,* 304 F.2d 53, 61-64 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963), concluded that the Civil Rules applied because habeas is a "civil" proceeding. As demonstrated in Argument V, *infra,* at pp. 69-73, these cases were erroneous. *Knowles v. Gladden,* 254 F.Supp. 643, 644-45 (D.Ore. 1965), relied upon title 28, United States Code, section 2246, and the Civil Rules. The *Knowles* decision is clearly in error. See Argument II, *supra,* pp. 19-22. *Harris v. North Carolina,* 240 F.Supp. 985, 989-90 (E.D.N.C. 1965), adopted a practice explicitly sanctioned by title 28, United States Code, section 2246.[10] As a matter of fact, not a single authority

[10]A careful reading of the case indicates that the interrogatories were used as provided in section 2246 to test evidence submitted in affidavit form:

> "[R]espondent has had the opportunity to cross-examine the affiant by means of interrogatories, counter-affidavit or deposition. Respondent chose the method of interrogatories as the method best able to serve its purpose." *Id.* at 990.

suggests that discovery has been a practice traditionally utilized in habeas corpus proceedings. See Argument V, *infra,* at pp. 61-62, 65-66.

Of course, a district court does have the power, implicit in its office, to regulate matters of internal administrative procedure, decorum, and courtroom order. *Tribune Review Publishing Co. v. Thomas,* 120 F. Supp. 362, 371 (W.D. Penn. 1954); see *Sheppard v. Maxwell,* 384 U.S. 333, 357-63 (1966); *Estes v. Texas,* 381 U.S. 532, 548, 562 (1965) (majority opinion and opinion of Warren, C.J., concurring). But discovery is a "significant innovation" which has "as great importance . . . as many a 'substantive' doctrine . . . ." *Miner v. Atlass, supra,* 363 U.S. at 649-50. It is hardly a matter of internal administrative procedure, decorum, or maintenance of order.

In authorizing the Supreme Court to formulate the Federal Rules of Civil Procedure, including the discovery provisions of Rules 26 to 37, it was the understanding of Congress that this was a delegation of the power held by Congress to limit the jurisdiction of the federal courts. This is made clear by the report of Representative Sumners in presenting the Federal Rules to the House:

> "It should be emphasized that any and all of the rules of procedure are subject to modification or repeal by Congress. Furthermore, it is the opinion of the Committee that amendments made by the Supreme Court to the united rules must be submitted to Gongress in accordance with the method prescribed for submitting the original rules, i.e., they must be submitted to Congress by

> the Attorney General at the beginning of a regular session and will not go into effect until after the close of that session." H.R. REP., No. 2743, 75th Cong., 3d Sess. 3-4 (1938).

The requirement of submitting proposed rule changes to Congress has also been codified. 28 U.S.C. § 2072 (1964). In every other case in which discovery practice has been instituted, this procedure has been followed. Thus when the scope of discovery in federal criminal cases was enlarged, it was done through the rule-making process. FED. R. CRIM. P. 16 (amended 1966). And when discovery was extended to proceedings in admiralty, it was accomplished by a change in the rules. FED. R. CIV. P. 1, 81(a)(1) (amended 1966). It is unthinkable that such a radical change in habeas corpus proceedings could be effected without congressional approval. See *Miner v. Atlass,* 363 U.S. 641, 650-51 (1960); *cf. Fay v. Noia,* 372 U.S. 391, 435 (1963); *Brown v. Allen,* 344 U.S. 443, 450 (1953). Obviously, this prerequisite is not met by a district court which creates rules *ex arbitrio judicis.*

An assertion of "inherent power" is particularly weak in the area of habeas corpus proceedings. Habeas jurisdiction arises under and procedure is defined in the Habeas Corpus Act. 28 U.S.C. §§ 2241-54 (1964); *Brown v. Allen,* 344 U.S. 443, 460-61 (1953); *Holiday v. Johnston,* 313 U.S. 342, 350-52 (1941); *Walker v. Johnston,* 312 U.S. 275, 283-85 (1941).

> "[T]he courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be

invested by it . . . ." *Cary v. Curtis,* 44 U.S. (3 How.) 235, 244-45 (1845).

The use of depositions has been authorized only for evidential purposes, and interrogatories are permitted only to provide a means akin to cross-examination for testing the credibility of an affiant. 28 U.S.C. § 2246 (1964) (see Argument II, *supra* at pp. 19-22). Hence the utilization of these techniques for discovery is clearly going beyond the statute and asserting an authority not granted thereby.

IV

THE "ALL WRITS" STATUTE DOES NOT PROVIDE A DISTRICT COURT WITH A BASIS FOR AUTHORIZING DISCOVERY INTERROGATORIES IN A HABEAS CORPUS PROCEEDING.

Relying upon title 28, United States Code, section 1651(a), petitioner asserts that discovery by interrogatories is authorized in habeas corpus, either as a writ of mandamus, a subpoena *ad testificandum,* or a subpoena *duces tecum* (Petitioner's Brief, pp. 6-7, 18-22). Assuming, *arguendo,* that petitioner may raise this issue for the first time in his brief,[11] his thesis is patently specious.

Petitioner commences this argument by characterizing the discovery order herein as the equivalent of a writ of mandamus, which writ may be issued under

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[11]Petitioner's third argument makes its debut in his opening brief. Section 1651(a) was not urged as the basis for discovery in the District Court, nor was it cited in the Court of Appeals. It was not even mentioned in his petition for certiorari.

section 1651(a). A writ of mandamus may be directed to any person, corporation, or inferior court. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 168 (1803); 3 W. BLACKSTONE, COMMENTARIES 110 (1768); see *Stern v. South Chester Tube Co.,* 390 U.S. 606, 608-09 (1968). But "it will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined." *United States v. Wilbur,* 283 U.S. 414, 420 (1931). A "ministerial" duty is an act to the performance of which the applicant is entitled as of right; the obligation to perform being a function of some public or private office. *Marbury v. Madison, supra,* 5 U.S. (1 Cranch) at 168; 3 W. BLACKSTONE, COMMENTARIES 110 (1768); *cf. Stern v. South Chester Tube Co., supra,* 390 U.S. at 608-10. "The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable." *United States v. Wilbur, supra,* 283 U.S. at 420.

There is clearly no law requiring either public or private persons to furnish a petitioner in habeas corpus with information which may lead to the discovery of some defect in the proceedings through which he was committed. Nor can a writ of mandamus create such a duty. "The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made." *United States ex. rel. International Contracting Co. v. Lamont,* 155 U.S. 303, 308 (1894). "The object of the writ is to enforce the performance of an existing duty, not to create a new one." *Ex parte Rowland,* 104 U.S. 604,

612 (1881); accord, *ibid.; Brunswick v. Elliott,* 103 F.2d 746, 750 (D.C. Cir. 1939).

Alternatively, petitioner classifies the discovery order as a subpoena *ad testificandum* or *duces tecum.* But the similarity is neither apparent nor real. "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and *agreeable to the usages and principles of law.*" 28 U.S.C. § 1651(a) (1964). "In determining what auxiliary writs are 'agreeable to the usages and principles of law,' we look first to the common law." *United States v. Hayman,* 342 U.S. 205, n. 35 at 221 (1952).

> "With regard to *parol* evidence, or *witnesses;* it must be first remembered that there is a process to bring them in by writ of subpoena *ad testificandum* (a subpoena to give evidence); which commands them, laying aside all pretenses and excuses, to appear at the trial . . . ." 3 W. BLACKSTONE, COMMENTARIES 369 (1768).

The function of this form of subpoena is to secure the presence of a witness at trial for the purpose of giving evidence. See *Blackmer v. United States,* 284 U.S. 421, 438 (1932); *Barry v. United States ex rel. Cunningham,* 279 U.S. 597, 618 (1929); *Blair v. United States,* 250 U.S. 273, 280-81 (1919). Thus a subpoena *ad testificandum* which is "agreeable to the usages and principles of law" cannot be used for discovery because the presence of the witness would not be sought for the purpose of giving evidence at trial. Nor can discovery be achieved through a subpoena

duces tecum. A subpoena *duces tecum* is confined to the production of papers, books, and other writings. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951);[12] *In re Shephard*, 3 F. 12, 13 (E.D.N.Y. 1880). But a subpoena *duces tecum* cannot be used for the purpose of discovery. *Cf. Bowman Dairy Co. v. United States, supra*, 341 U.S. at 220; *United States v. Carter*, 15 F.R.D. 367, 369 (D.D.C. 1954) (opinion of Holtzoff, D.J.). Discovery is impossible under such a subpoena because the documents need not be produced until the time of trial. Statement of G. Youngquist (Member of Advisory Committee on Federal Rules of Criminal Procedure), PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES OF CRIMINAL PROCEDURE 167-68 (N.Y.U. School of Law, Institute Proceedings, Vol. VI, Holtzoff ed., 1946), quoted in *Bowman Dairy Co. v. United States, supra*, 341 U.S., n. 5 at 220; see *United States v. Ferguson*, 37 F.R.D. 6, 7 (D.D.C. 1965) (opinion of Holtzoff, D.J.); *United States v. Carter, supra*, 15 F.R.D. at 369; *United States v. Maryland & Va. Milk Producers Ass'n*, 9 F.R.D. 509, 510 (D.D.C. 1949) (opinion of Holtzoff, D.J.), cited in *Bowman Dairy Co. v. United States, supra*, 341 U.S. at 220.[13] Hence a subpoena *duces tecum* cannot

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[12] In *Bowman Dairy, supra*, it was noted that Criminal "Rule 17 provided for the usual subpoena *ad testificandum* and *duces tecum*. . . ." Federal Rule of Criminal Procedure 17(c) provides process for the production of "books, papers, documents or other objects designated therein."

[13] In *United States v. Carter, supra*, Judge Holtzoff discussed what this Court in *Bowman Dairy, supra*, called the "chief innovation" of Criminal Rule 17:

> "Rule 17(c) deals with subpoenas *duces tecum* and is for the most part a restatement of preexisting law. It makes an addition, however, to the effect that the court *may* direct

be used for discovery herein since it requires the production of existing written evidence rather than oral evidence or writings prepared in response to interrogatories, and also because it is not returnable until the time of trial. As Judge Benedict aptly observed in *In re Shephard, supra,* 3 F. at 13: "The writ now under consideration seems, therefore, to be a novelty, not agreeable to any usage of the law, and therefore not within the power conferred by the statute."[14]

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that a subpoena *duces tecum* be returnable prior to the trial, and *may* permit the documents and objects that have been subpoenaed to be inspected on the return day. The purpose of this Rule was not to grant additional discovery, but merely to facilitate and expedite trials, in order that a trial may not be delayed while counsel are examining voluminous documents produced in response to subpoena. It was contemplated that a Rule such as this would be particularly helpful in protracted trials in which there is mass of documentary evidence, such as antitrust cases, mail fraud cases, and other similar proceedings."

This new "pre-trial" subpoena *duces tecum* does not apply to habeas corpus cases since the Criminal Rules are inapplicable thereto. FED. R. CRIM. P. 54, n. 5 to subdivision (b)(4).

[14]For the contrary proposition, petitioner cites: *Olson Rug Co. v. NLRB,* 291 F.2d 655, 659 (7th Cir. 1961); *Bethlehem Shipbuilding Corp. v. NLRB,* 120 F.2d 126, 127 (1st Cir. 1941); *Kamen Soap Prods. Co. v. United States,* 110 F.Supp. 430, 439 (Ct. Cl. 1953). *Kamen* declares that section 1651(a) is authority for the issuance of a subpoena *duces tecum* returnable before a commissioner appointed to take evidence, but it does not hold that a subpoena *duces tecum* may be used for discovery. *Kamen Soap Prods. Co. v. United States, supra,* 110 F.Supp. at 435-39. Though *Bethlehem* did reach that result, no authority was cited for such a proposition. As respondent demonstrates in this argument, there is none. *Olson* relied upon *Bethlehem* and suffers from its fundamental defect.

In addition, however, it should be noted that *Olson* and *Bethlehem* were contempt actions arising out of National Labor Relations Board orders. Enforcement proceedings in the district courts are governed by the Civil Rules. FED. R. CIV. P. 81(a)(5). As the court in *Bethlehem* observed, the discovery rules would seem to apply to the court of appeals by analogy since it, rather than the district court, was the trier of fact. *Bethlehem Ship-*

That petitioner's arguments that these three writs afford a basis for the District Court's discovery order is but an aberrant novelty does not turn solely upon a logical analysis of their functions and limitations. The "all writs" statute has been continuously in force since the Judiciary Act of 1789.[15] See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942). But until the advent of the Federal Rules of Civil Procedure, there was no provision for discovery under federal law, with the exception of Equity Rule 58; 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 641 at 11 (Wright rev. 1941); see *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).[16] Had mandamus, subpoenas *ad testificandum*, and subpoenas *duces tecum* been available as discovery tools, this would not have been the case

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building Corp. v. NLRB, supra, 120 F.2d at 126. In the sense that the subpoena powers in district court proceedings to enforce National Labor Relations Board orders have been "enlarged" by the discovery provisions of the Civil Rules, the expansion has not extended to subpoenas issued in habeas corpus cases. See text accompanying note 18, *infra*, at p. 45, and following note 19, *infra*, at pp. 46-47. Unlike contempt actions, habeas corpus proceedings have always been considered regulated by statute. See text preceding note 19, *infra*, at p. 46. The limited use of depositions and interrogatories in habeas corpus cases, 28 U.S.C. § 2246 (1964), would seem to preclude accomplishing, by some devious route, something which is forbidden by statute. See pp. 45-47, *infra*.

[15] Ch. 20, § 14, 1 Stat. 81.

[16] Accidental discovery was also possible under a statute permitting depositions *de bene esse*, a statute authorizing depositions under *dedimus potestatum* or *in perpetuam*, and Equity Rule 47 which allowed pre-trial depositions of witnesses in exceptional cases. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 19 (1938), quoted in 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 641, n. 10 at 12 (Wright rev. 1961). The scope of these provisions is discussed in Argument V, *infra*, at pp. 62-68.

and there would have been no necessity for the discovery provisions of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the 1966 amendments to the Civil Rules to permit discovery in admiralty.[17] Since Equity Rule 58 was the only discovery provision in federal law, the use of mandamus or subpoenas for that purpose is not "agreeable to the usages and principles of law."

Petitioner nevertheless points to *Price v. Johnston*, 334 U.S. 266, 282 (1948), as authority for the proposition that the scope of writs under section 1651(a) is constantly expanding to achieve the "rational ends of law."[18] But that statute does not permit unlimited expansion or mutation of traditional forms. It is not a blank check which may be filled in without regard

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[17] FED. R. CIV. P. 1, 81(a)(1). In Rule 1, "or in admiralty" was added after "cognizable as cases at law or in equity." The first sentence of Rule 81(a)(1) in its original form read: "These rules do not apply to proceedings in admiralty." This was changed to: "These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C. §§ 7651-81."

[18] The passage quoted is as follows:

> "[W]e do not conceive that a circuit court of appeals, in issuing a writ of *habeas corpus* under § 262 of the Judicial Code, is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of 'law,' a term which is unlimited by the common law or the English law. And since 'law' is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the *habeas corpus* writ authorized by § 262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read § 262 as an ossification of the practice and procedure of more than a century and a half ago. Rather it is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.' *Adams v. United States ex rel. McCann, supra*, 273."

to statutory procedures or rules adopted under congressional sanction. Any use of the judicial writ power is confined within the framework established by Congress to regulate the proceeding in which that power is exercised. See *Adams v. United States ex rel. McCann,* 317 U.S. 269, 273 (1942). Where the statutes establish procedures or limit their application, a court cannot issue a writ whose only effect would be to avoid those conditions and thwart the congressional policy. *Cf. Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 30 (1943). This restriction upon the writ power is similar to the congressional limitation of jurisdiction, of which this Court has said: "To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely." *Cary v. Curtis,* 44 U.S. (3 How.) 235, 244 (1845).

It has been repeatedly acknowledged that proceedings in federal habeas corpus are confined within the framework of the statutory scheme. *Brown v. Allen,* 344 U.S. 443, 460-61 (1953); *Holiday v. Johnston,* 313 U.S. 342, 350-51 (1941); *Walker v. Johnston,* 312 U.S. 275, 283-84 (1941). Though depositions and interrogatories are permitted in habeas proceedings, they are authorized only for the production of evidence and not to accomplish discovery. 28 U.S.C. § 2246 (1964); see Argument II, *supra,* at pp. 19-22.[19] Insofar as the subpoena power now permits discovery,

[19] "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929).

this expansion has been made only through the adoption of rules of procedure. FED. R. CIV. P. 45, implementing FED. R. CIV. P. 26-37; FED. R. CRIM. P. 17. These rules do not apply to habeas corpus proceedings. FED. R. CIV. P. 81(a)(2); FED. R. CRIM. P. 54, n. 5 to subdivision (b)(4). Consequently, the subpoena powers in habeas corpus cases have not been enlarged. To hold otherwise would be to thwart the congressional policy found in the exclusionary provisions of Civil Rule 81(a)(2) and Criminal Rule 54. *Cf. Bowman Dairy Co. v. United States,* 341 U.S. 214, 220 (1951); *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 30 (1943).

Nor does the passage from *Price v. Johnston,* 334 U.S. 266, 282 (1948), seem applicable to the discovery area, for section 1651(a) was therein described as a "source of procedural instruments." But discovery is not merely a "procedural" matter, for it is a significant innovation in judicial proceedings which is tantamount to a substantive doctrine. *Miner v. Atlass,* 363 U.S. 641, 649-50 (1960).

> "The problem then is one which peculiarly calls for the exacting observance of the statutory procedures surrounding the rule-making powers of the Court . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Id.* at 650.

V

THE DISCOVERY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT APPLY TO HABEAS CORPUS PROCEEDINGS.

Lastly, petitioner argues that the discovery provisions of the Federal Rules of Civil Procedure extend to habeas corpus cases (Petitioner's Brief, p. 7, 23-25).[20] The Federal Rules themselves define their limits and indicate that the discovery provisions are not appropriate to habeas corpus proceedings. Rule 1, entitled "Scope of Rules," states that:

> "These rules govern the procedures in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, *with the exceptions stated in Rule 81.*" (Emphasis added.)

Rule 81(a)(2) declares that:

> "These rules are applicable to . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions."[21]

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[20] This is the only one of petitioner's four present claims which was raised in the Court of Appeals.

[21] As originally promulgated, the rule read:

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . habeas corpus. . . ."

After separate appellate rules were promulgated in 1968, the phraseology was changed to "eliminate inappropriate references to appellate procedure." FED. R. CIV. P. 81(a), n. to 1968 amendment.

The clarity of this exclusionary provision has been obscured by the passage of time. As a consequence, courts which have considered the applicability of various of the Civil Rules to habeas corpus proceedings have reached diverse conclusions. Some discuss specific rules in the factual context in which they arise, seemingly assuming their applicability without making an initial determination.[22] Some state that the Rules apply because habeas corpus is a civil proceeding.[23] One concluded that a rule had to apply

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[22] *Fortner v. Balkcom*, 380 F.2d 816, 818, 820-21 (5th Cir. 1967) (Rules 5(b) [service on attorney], 31 [deposition on interrogatories], 52(a) [findings of fact]); *Molignaro v. Dutton*, 373 F.2d 729, 730 (5th Cir. 1967) (Rule 31 [deposition on interrogatories]); *Rogers v. Bennett*, 320 F.2d 83, 86 (8th Cir. 1963) (dictum) (discovery procedures); *Sullivan v. Dickson*, 283 F.2d 725, 727 (9th Cir. 1961) (Rules 27(c) [perpetuation of testimony], 30 [depositions on oral examination], 34 [production of documents], 45(b) [subpoena *duces tecum*]), cert. denied, 366 U.S. 951 (1961); *Chessman v. Teets*, 239 F.2d 205, nn. 7 & 8 at 211 (9th Cir. 1956) (Rules 26 [depositions pending action], 45(e)(1) [subpoena of witness]), rev'd on other grounds, 354 U.S. 156 (1957); *Hammerer v. Huff*, 110 F.2d 113, 115 (D.C. Cir. 1939) (Rule 8(d) [failure to deny]); *Bowen v. Boles*, 258 F. Supp. 111, 113 (N.D. W.Va. 1966) (Rule 6(b)(2) [enlargement of time]); *United States ex rel. Bruno v. Herold*, 39 F.R.D. 570, 572 (N.D.N.Y.) (Rule 60(b)(6) [relief from judgment]), rev'd on other grounds, 368 F.2d 187 (2d Cir. 1966); *Smith v. United States*, 174 F.Supp. 828, 830, 835 (S.D. Cal. 1959) (Rules 17(c) [guardian ad litem], 35 [mental examination]), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960); *Hamilton v. Hunter*, 65 F.Supp. 319, 320 (D. Kan. 1946) (Rule 15(b) [amendment by implied consent]).

[23] *Schiebelhut v. United States*, 318 F.2d 785, 786 (6th Cir. 1963) (Rules 33 [interrogatories to parties], 37(d) [failure to serve answers]); *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 61-64 (5th Cir. 1962) (Rule 36(a) [request for admissions]), cert. denied, 372 U.S. 915 (1963); *Bowdidge v. Lehman*, 252 F.2d 366, 368 (6th Cir. 1958) (Rules 56 [summary judgment], 57 [declaratory judgment]); *Estep v. United States*, 251 F.2d 579, 581-83 (5th Cir. 1958) (Rules 41(a)(1) [voluntary dismissal], 45 [subpoena]); *Lyles v. Beto*, 32 F.R.D. 248 (S.D. Tex. 1963) (Rule 45(e)(1) [subpoena]).

because other courts had applied other rules.[24] Two cases relied not only upon other "civil-case-means-civil-rules" decisions, but also held that application of the rules was necessary to effectuate a statutory policy.[25] In another decision, the judge declared that he had "inherent power" to order proceedings conducted in a manner similar to the civil rules.[26] One court refused to apply Rule 35, noting that the rules apply only to civil cases.[27] Another found that Rule 81(a)(2) precluded application of Rule 52.[28] Two courts have held the civil rules inapplicable to habeas corpus,[29] and three others consider them appropriate only by way of analogy.[30] This Court has held Rule

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[24] *Abel v. Tinsley*, 338 F.2d 514, 515-16 (10th Cir. 1964) (Rule 60(b) [relief from default]).

[25] *Knowles v. Gladden*, 254 F.Supp. 643, 644-45 (D.Ore. 1965) (Rules 26 [depositions pending action] and 30 [depositions on oral examination] to implement section 2246); *In re McShane*, 235 F.Supp. 262, 266 (N.D.Miss. 1964) (Rule 56 [summary judgment] to effect section 2243).

McGarrah v. Dutton, 381 F.2d 161, 163 (5th Cir. 1967) (Rule 26(d)(3), (4) [deposition of deceased witness]), probably fits into this category. The responses to interrogatories prepared and used in a state habeas proceeding were admitted into evidence under the authority of the Federal Rules and sections 2246-47. Section 2247 appears to permit the use of such evidence.

[26] *Hardison v. Dunbar*, 256 F.Supp. 412, 414 (N.D.Cal. 1966) (similar to Rule 59(b) [motion for new trial]).

[27] *United States v. Burdette*, 161 F.Supp. 326, 331 (E.D. Mich. 1957) (Rule 35 [mental examination]), aff'd, 254 F.2d 610 (6th Cir. 1958), cert. denied, 359 U.S. 976 (1959).

[28] *United States ex rel. McCann v. Adams*, 3 F.R.D. 396, 404 (S.D. N.Y. 1944) (Rule 52 [findings of fact]).

[29] *Albert ex rel. Buice v. Patterson*, 155 F.2d 429, 433 (1st Cir.), cert. denied, 329 U.S. 739 (1946); *Burleson v. United States*, 205 F.Supp. 331, 334 (W.D.Mo. 1962).

[30] *Wilson v. Weigel*, 387 F.2d 632, n. 3 at 634 (9th Cir. 1967); *United States ex rel. Goldsby v. Harpole*, 249 F.2d 417, n. 3 at 420 (5th Cir. 1957), cert. denied, 361 U.S. 850 (1959); *United States ex rel. Jelic v. District Director of Immigration*, 106 F.2d 14, 20 (2d Cir. 1939).

53 inapplicable, and has pointed out that practice in habeas corpus is governed by statute. *Holiday v. Johnston*, 313 U.S. 342, 353 (1941). Three courts have also literally interpreted Rule 81(a)(2), thus testing the particular rule against prior practice to ascertain its applicability.[31] In view of these conflicting authorities, then, it is necessary to carefully examine Rule 81(a)(2) to determine the scope of its limitation.

Rule 81(a)(2) provides that the Civil Rules are applicable to habeas corpus "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." A literal reading compels an historical analysis of each procedural problem as it arises. See cases cited in note 31, *supra*. "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination."'" *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943); *cf. Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 444 (1955).

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[31]These include: the decision below, *Wilson v. Harris*, 378 F.2d 141, 143-44 (9th Cir. 1967) (Rules 26 and 33 [interrogatories to parties] do not apply); *Hunter v. Thomas*, 173 F.2d 810, 812 (10th Cir. 1949) (Rule 59 [motions for new trial] applies); *Sullivan v. United States*, 198 F.Supp. 624, 625-27 (S.D. N.Y. 1961) (Rule 33 [interrogatories to parties] does not apply).

A. Analysis of the legislative history of the Rule 81(a)(2) exclusion compels the conclusion that the framers intended the Rules to have an exceedingly limited applicability to habeas corpus.

The genealogy of the Rule 81 exceptions discloses that the habeas corpus exclusion was neither casually inserted nor intended as part of a catchall section. The exceptions incorporated into the preliminary draft of the Federal Rules did not include a reference to habeas corpus. However, as Edward H. Hammond, a member of the legal staff of the Advisory Committee of Federal Rules, noted, the final draft specifically mentioned habeas corpus, evidently as a result of suggestions from the bench or bar. Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure*, 23 A.B.A.J. 629, 634 (1937); compare ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT 163, draft rule 90(a) (May 1936), with ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT 206, draft rule 83(a)(2) (April 1937).

It is clear that the framers of the Federal Rules, in making specific reference to habeas corpus in Rule 81, intended that the Federal Rules should have only limited applicability to habeas proceedings. Habeas corpus, though considered a "civil action," was nevertheless a "special proceeding" to which the normal rules for civil actions did not apply, except when a habeas corpus question was appealed. On March 4, 1938, Edgar B. Tolman, the Secretary of the Advisory Committee on Rules for Civil Procedure, appeared before the Judiciary Committee of the House of Rep-

resentatives. In explaining the proposed Federal Rules, which required congressional approval, Mr. Talman testified:

> "Rule 81 is entitled 'Applicability in General.' The rules are intended to apply to all civil actions, but there are some special proceedings for which a special procedure has already been prescribed by Congress and to which they do not apply . . . . They apply to appeals with regard to . . . habeas corpus . . . ." *Hearings on H.R. 8892 Before the House Comm. on the Judiciary,* 75th Cong., 3d Sess., ser. 17, at 130 (1938).

That Rule 81 was meant to generally exclude habeas proceedings from the scope of the Federal Rules is also evidenced in statements made by William D. Mitchell, Chairman of the Advisory Committee, during his discussion of the rules at various symposiums conducted by the Institute on the Federal Rules of Civil Procedure held in 1938 under the auspices of the American Bar Association. Chairman Mitchell stated that "the rules . . . do not apply in . . . habeas corpus . . . that is all dealt with in Rule 81" ABA, PROCEEDINGS OF THE INSTITUTE ON THE FEDERAL RULES OF CIVIL PROCEDURE AT WASHINGTON, D.C., AND OF THE SYMPOSIUM AT NEW YORK CITY 187 (1938). "Nor do the rules apply to habeas corpus, . . . except as to appeals." *Id.* at 230. Rule 1, by its reference to Rule 81 demonstrates the limited applicability of the Federal Rules to habeas proceedings. This is made clear in this discussion by Chairman Mitchell:

> "The only other matter I need speak of in Rule 1 is the reference to Rule 81. Rule 1 provides,

> 'these rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases in law or in equity, with the exceptions stated in Rule 81.' I will just skim over Rule 81 for a moment to give you the idea . . . . They [these rules] do apply to appeals, *but not otherwise,* in cases . . . [of] *habeas corpus* . . . ." *Id.* at 233 (emphasis added).

In *United States ex rel. Jelic v. District Director of Immigration,* 106 F.2d 14, 20 (2d Cir. 1939), Judge Charles E. Clark, Reporter to the Advisory Committee, similarly declared: "But the rules have only a limited application by way of analogy to habeas corpus proceedings, Rule 81(a)(2) . . . ."

The rationale behind the exclusion of habeas proceedings is not readily apparent, though the text of Rule 81 does suggest it. As originally promulgated, Rule 81 stated that the Federal Rules did not apply to habeas proceedings "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity." Texts and cases prior to the adoption of the Federal Rules are not particularly enlightening as to the procedure followed in habeas actions. However, the reasoning of the Advisory Committee is apparent in the testimony of its Secretary, Mr. Talman. In explaining to the House Judiciary Committee why, under Rule 81, the Federal Rules did not apply to habeas proceedings, Mr. Talman said, "[T]here are

some special proceedings *for which a special procedure has already been prescribed by Congress* and to which they do not apply." *Hearings on H.R. 8892 Before the House Comm. on the Judiciary,* 75th Cong., 3d Sess., ser. 17, at 130 (1938) (emphasis added). Thus it is clear that the Federal Rules were not extended to habeas corpus because federal statutes already established what procedure was to be followed. This, then, explains the somewhat ambiguous note to Rule 81 which was appended by the Advisory Committee: "For example of statutes which are preserved by paragraph (2) see: . . . Title 28 . . . (Habeas corpus) . . . ." FED. R. CIV. P. 81, n. to subdivision (a). Had habeas corpus not been generally excluded under Rule 81 (a)(2), all of the statutes establishing habeas procedure would have been repealed upon the adoption of the Civil Rules. 28 U.S.C. § 2072 (1964).

Discussions of the then-new Federal Rules by contemporary practitioners disclose a uniform interpretation of Rule 81 as excluding habeas corpus:

> "In federal practice there are a number of cases of special nature which are not ordinary civil actions. Rule 81 makes specific mention of a good many special actions which are governed in whole or in part by special statutory provisions and to which these rules do not apply except to the extent stated in Rule 81. In connection with the application of the rules, it is, therefore, essential to look at Rule 81 so as to see where they do not apply." Edmunds, *New Federal Rules of Civil Procedure,* 4 JOHN MARSHALL L.Q. 291, 293 (1938-39).

> "The exceptions mentioned in this rule [Rule 1] refer to certain proceedings named in Rule 81, such as bankruptcy, admiralty, citizenship, deportation and others [including habeas corpus], to which the new rules do not apply." Hopkinson, *The New Federal Rules of Civil Procedure compared with the Former Federal Equity Rules and the Wisconsin Code,* 23 MARQ. L. REV. 159, 161 (1938).

Mr. Hopkinson further noted that "in the following proceedings, these rules apply only to appeals: . . . habeas corpus . . . ." *Id.* at 188 (interpreting Rule 81). The comprehensive statutory scheme was also held to be the exclusive procedure to be followed in *Holiday v. Johnston,* 313 U.S. 342 (1941). This Court noted that "the Acts of Congress . . . [regulate] the practice in habeas corpus cases." *Id.,* 313 U.S. at 349.

> "Rule 81(a)(2) provides that appeals in habeas corpus cases are to be governed by the rules, but that the rules are not applicable 'otherwise than on appeal' in habeas corpus cases 'except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity * * *.' . . . [T]he practice in habeas corpus is set forth in plain terms in the Revised Statutes . . . ." *Id.,* 313 U.S. at 353.

Similarly, the Advisory Committee on the Federal Rules of Criminal Procedure observed that the Federal Rules of Civil Procedure do not apply to habeas corpus cases.

> "As habeas corpus proceedings are regarded as civil proceedings, they are not governed by these

> rules. The procedure in such cases is prescribed by 28 U.S.C. §§ 2241-2243, 2251-2253, formerly §§ 451-466. Appeals in habeas corpus proceedings are governed by the Federal Rules of Civil Procedure (Rule 81(a)(2) of the Federal Rules of Civil Procedure)." FED. R. CRIM. P. 54, n. 5 to subdivision (b)(5).

It should also be noted that title 28, United States Code, section 2242, provides that the application for a writ of habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." This provision would be unnecessary if the rules were generally applicable. *Cf. Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929).

Those who drafted the Federal Rules were of the opinion that they did not apply to habeas corpus cases.[32] Contemporary practitioners shared that belief. Those who drafted the Federal Rules of Criminal Procedure also considered the statutes the only source of habeas procedure. Even this Court has said that "the practice in habeas corpus is set forth in plain terms in the . . . statutes . . . ." *Holiday v. Johnston,* 313 U.S. 342, 353 (1941). Thus, it is clear that the

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[32]Petitioner suggests that these "informal" remarks are now considered inaccurate, citing: Note, *Civil Discovery in Habeas Corpus,* 67 COLUM. L. REV. 1296, n. 16 at 1298 (1967); Note, *Multiparty Federal Habeas Corpus,* 81 HARV. L. REV. 1482, n. 100 at 1495 (1968) (Petitioner's Brief, p. 27). However, it seems doubtful that students examining a complex system of rules 30 years after they were written know more about what those rules meant than the persons who drafted them.

Federal Rules of Civil Procedure have only limited applicability to proceedings in habeas corpus.[33]

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[33]Petitioner responds as follows:

> "The first time habeas corpus was mentioned in any draft was in a draft of February 20, 1937. It specified that except for appeals to which the rules would be applicable, habeas corpus would be governed exclusively by existing statutes. *Advisory Comm. on Rules for Civil Procedure, Preliminary Draft 3 as Revised,* draft Rule 90(a) (Feb. 20, 1937). Had such a provision been enacted it would have provided the blanket exclusion for which Respondent contends." (Petitioner's Brief, p. 27)

Respondent has been unable to establish the existence of "Preliminary Draft 3 as Revised" to which petitioner refers. There were only two "preliminary" drafts generally promulgated: ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT (May 1936); ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT (April 1937). See Hopkinson, *The New Federal Rules of Civil Procedure compared with the Former Equity Rules and the Wisconsin Code,* 33 MARQ. L. REV. 159 (1939); Pike, *The New Federal Rules of Civil Procedure,* 12 CALIF. STATE B.J. 192 (1937). These were the only drafts published. See SUPERINTENDENT OF DOCUMENTS, MONTHLY CATALOG OF UNITED STATES PUBLIC DOCUMENTS (1937); SUPERINTENDENT OF DOCUMENTS, MONTHLY CATALOG OF UNITED STATES PUBLIC DOCUMENTS (1936). Respondent was advised by Mr. Carl H. Imlay, General Counsel, Administrative Office of the United States Courts, that the two drafts noted above were the only ones of which he had a record. We suspect that petitioner obtained this citation from Note, *Multiparty Federal Habeas Corpus,* 81 HARV. L. REV. 1482 (1968), since the identical citation appears in footnote 98 on page 1495, and the text corresponding thereto is virtually identical. Respondent does not wish to impugn either the veracity of the Harvard Law Review or petitioner's motives. It may well be that the editors of that Note had access to a draft kept within the confines of the Committee. Nevertheless respondent feels obligated to note that he has been unable to examine this "authority" to which only the Harvard Law Review is privy.

Even if the draft were extant, it would not alter respondent's argument. We agree with petitioner insofar as he suggests that the Committee "could have" specifically restricted habeas corpus proceedings to the statutes. But that was not done. Respondent directs his argument at what was *meant,* regardless of the phraseology in Rule 81(a)(2) as promulgated.

B. Discovery under the Civil Rules does not apply to habeas corpus since neither criterion of Rule 81(a)(2) can be satisfied.

Under Rule 81(a)(2), the Civil Rules relating to discovery are applicable to habeas proceedings only if the practice in habeas (1) "is not set forth in statutes of the United States," and (2) "has heretofore conformed to the practice in civil actions." See *Wilson v. Harris,* 378 F.2d 141, 143-44 (9th Cir. 1967) (the case at issue herein); *Hunter v. Thomas,* 173 F.2d 810, 812 (10th Cir. 1949); *Sullivan v. United States,* 198 F.Supp. 624, 625-27 (S.D.N.Y. 1961). Under this test, it is clear that the discovery procedures of the Federal Rules do not apply in habeas corpus cases.

Petitioner cannot satisfy the first criterion simply by noting that discovery interrogatories are not expressly forbidden by the Habeas Corpus Act. Instead, the Act must be examined to determine whether it regulates the use of interrogatories. If the Act makes no provision for them, then the proper inquiry is whether such discovery is a concept alien to and incompatible with the statutory scheme. *Cf. Walker v. Johnston,* 312 U.S. 275, 285-86 (1941). But the second step cannot be reached, for the use of depositions and interrogatories in habeas is already regulated by statute and limited to evidentiary purposes. 28 U.S.C. § 2246 (1964); see Argument II, *supra,* at pp. 19-22. This restriction negatives the utilization of such techniques for discovery. See *Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929). Since section 2246 was enacted in 1948, almost ten years after adoption of the Federal Rules had authorized the use of

depositions and interrogatories as discovery tools, the section 2246 restriction indicates congressional rejection of discovery practices in the context of habeas corpus. See *Holiday v. Johnston,* 313 U.S. 342, 353 (1941). Furthermore, section 2242 requires the habeas petitioner to allege under oath the facts upon which he relies for relief. These allegations must establish a prima facie case before an order to show cause may be issued. *Brown v. Allen,* 344 U.S. 443, 502 (1953) (concurring opinion of Frankfurter, J., joined by majority of Court). As this Court observed in *Walker v. Johnston, supra* at 285, in interpreting the Habeas Corpus Act, "The question is what the statute requires." Section 2242 plainly requires the petitioner to know and allege the facts. This leaves no room for discovery.

To satisfy the second criterion, it is necessary to show that, prior to the adoption of the Federal Rules in 1938, interrogatories were used for discovery in civil actions[34] and that the practice in habeas corpus proceedings conformed thereto.[35] This requisite can-

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[34] As originally promulgated, Rule 81(a)(2) required that the practice in habeas cases must conform to the prior practice in "actions at law or suits in equity." See note 21, *supra* at 48.

[35] Of this requirement, petitioner complains:

> "[I]t would . . . confine modern habeas corpus to those [traditional] procedures alone. A procedural advance included in the Rules could not by definition conform to any procedure used in habeas corpus prior to enactment of the Rules. The effect of this reading of Rule 81(a)(2) would thus be to exclude such an advance automatically from use in habeas corpus proceedings. There is absolutely no evidence that the framers of Rule 81(a)(2) intended in this manner to freeze habeas proceedings in their pre-1938 form." (Petitioner's Brief, p. 30)

"[H]as heretofore conformed to the practice" certainly indicates that the drafters did not intend to work any change upon practice

not be met. Examination of all authorities on the subject has failed to disclose any American, English, or Canadian case prior to 1938 wherein discovery was allowed in a habeas corpus proceeding.[36] Not a single text on habeas corpus which we have examined suggests that discovery was part of the former federal habeas practice.[37] Conversely, none of the texts on discovery intimate that it could be had in habeas

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in habeas corpus. In addition, Congress decreed that "such rules shall not abridge, enlarge or modify any substantive right. . . ." 28 U.S.C. § 2072 (1964). As this Court observed in *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941):

> "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act . . . authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantial rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

Since this court has recognized the discovery practice as a substantial innovation tantamount to a substantive right, it cannot be extended to a class of actions to which the Rules did not apply. *Miner v. Atlass*, 363 U.S. 641, 648-50 (1960).

[36]Respondent has found only one habeas corpus case in which the subject is even broached. In *Re Smart Infants*, 12 Ont. Pr. R. 2 (1887), a father filed a petition for habeas corpus to recover the custody of his children who were with their mother. Discovery examination of each parent was ordered by consent:

> "It was also agreed by counsel that in case I should direct that the evidence should be *viva voce*, the parties should submit to examination *as in an ordinary action*. Any order or direction that may issue will, if considered necessary, contain this term of it." *Id.* at 6 (emphasis added).

If anything, this case suggests that discovery is not applicable to habeas corpus cases.

[37]See 1 W. Bailey, Habeas Corpus and Special Remedies §§ 1-61 (1913); W. Church, Habeas Corpus (2d ed. 1893); F. Ferris & F. Ferris, Jr., Extraordinary Legal Remedies § 53 (1926); R. Hurd, Habeas Corpus 289-319 (2d ed. 1876); D. Prem, Habeas Corpus 13-36 (1950); J. Scott & C. Roe, Habeas Corpus (1923); 2 T. Spelling, Injunctions and Extraordinary Remedies §§ 1151-1260 (1901).

corpus.[38] The uniform silence of all these authorities suggests that it is not the practice, and has never been the practice, to allow discovery in habeas proceedings. Habeas practice has limited depositions and interrogatories to use as evidence at the hearing. 28 U.S.C. § 2246 (1964) and reviser's note.

That the type of discovery embraced by the Civil Rules was not applicable to habeas corpus proceedings is made clear by examination of the discovery practice available in federal courts prior to adoption of the Rules.

> "There were just four sources or authority for any proceeding involving discovery before trial in the federal courts. Those four sources were two statutes and two equity rules. The two statutes were 28 *United States Code,* section 639, dealing with depositions *de bene esse,* and 28 *United States Code,* section 644, dealing with depositions under *dedimus potestatum* and *in perpetuam.* . . . The two statutes applied in both law and equity cases. . . . As a matter of fact there was no discovery as such provided by the two statutes. They did not purport to do more than authorize depositions before trial for the purpose of obtaining proof, not for the purpose of discovery. Discovery was a mere accidental incident. The need for taking depositions as proof was the condition for taking them. The need for discovery had nothing to do with

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[38] See E. Bray, Discovery (1885); T. Hare, Discovery (3d Am. ed. 1850); W. Kerr, Discovery (1870); C. Peile, Discovery (1883); G. Ragland, Jr., Discovery Before Trial 27-31 (1932); R. Ross, Discovery (1912); J. Wigram, Discovery (2d ed. 1840).

the matter. Thus, under section 639, dealing with depositions *de bene esse,* depositions were allowed when the witness lived more than one hundred miles from the place of trial, or was on a voyage at sea, or when the witness was aged or infirm, *etc.* . . . Section 644, for depositions under a *dedimus* or for perpetuation of testimony, prescribed that depositions could be taken only to prevent a failure or delay of justice. Those were limitations placed upon the taking. The special need for taking must appear from the circumstances of the particular case. And the statute also prescribed that the deposition must be taken according to common usage. The Supreme Court held, in *Ex parte Fiske* [113 U.S. 713, 724 (1885)], that calling upon a party in advance of trial to extract something which the other party might use or not as suited his purpose, was a very special usage, based upon local statutes, and not within section 644. The incidental value of section 644 for discovery purposes was therefore exceedingly small. Furthermore, in law cases there was no discovery whatever, incidental or otherwise, in respect to documents. These could be called for in advance of the trial only by subpoena *duces tecum* in connection with depositions taken under one of the two statutes. There was therefore the same primary restriction upon discovery by documents as upon discovery by oral examination. Discovery of documents was purely incidental to the taking of proof." Sunderland, *The New Federal Rules,* 45 W. Va. L. Q. 5, 19-20 (1938).[39]

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[39]Mr. Sunderland was a member of the Advisory Committee on Rules for Civil Procedure. His article is quoted in 2A W. Barron & A. Holtzoff, Federal Practice and Procedure § 641, n. 10 at 12-13 (Wright rev. 1961).

The procedure attempted by the real party in interest below did not fall within any of these categories because the interrogatories were plainly intended for discovery (see A 34-35). It was not even similar to a deposition *de bene esse* since the witness was not more than 100 miles from the court, on a voyage, or infirm. It could not be considered a deposition under *dedimus potestatum,* since that deposition could not be used for discovery. *Ex parte Fiske,* 113 U.S. 713, 714 (1885); *Turner v. Shackman,* 27 F. 183, 184 (1886); *ibid.* Nor was it like a deposition *in perpetuam,* since that practice was permitted only when the party who filed the bill could not have the issue determined by immediate litigation. *E.g.,* G. BISPHAM, EQUITY § 35 at 53, § 573 at 858 (10th ed., McCoy rev., 1925) 1 J. POMEROY, EQUITY JURISPRUDENCE § 211 at 358 (5th ed., Symonds rev., 1941); 3 J. STORY, EQUITY JURISPRUDENCE § 1960 (14th ed., Lyon ed., 1918).[40] These limitations upon depositions—permissible only if obtained for evidentiary purposes—are the same as those now specifically set out in the Habeas Corpus Act. 28 U.S.C § 2246 (1964).

The only provision through which discovery could be obtained was Equity Rule 58. 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 641 at 11 (Wright rev. 1961); Sunderland, *The New Federal*

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[40] "The jurisdiction in suits to PERPETUATE TESTIMONY arises where the fact, to which the testimony relates, cannot be immediately investigated at law, *e.g.,* where the person filing the bill has merely a future interest, or having an immediate interest, is himself in possession and not actually disturbed, though threatened by the defendant with disturbance at a future time." J. ADAMS, EQUITY 83-84 (8th ed., Ralston rev., 1890).

Rules, 45 W. VA. L. Q. 5, 20 (1938). Any discovery resulting from evidentiary depositions taken under Equity Rule 47 was merely accidental. Sunderland, *supra* at 20. Habeas corpus has always been considered a civil proceeding. *Fisher v. Baker,* 203 U.S. 174, 181 (1906). Though civil in nature, habeas corpus is *sui generis.* It is administered by courts of law rather than courts of equity. See *Goldsmith v. Valentine,* 36 App. D.C. 63, 66-67 (1910).[41] Consequently, the equity rules providing discovery did not apply to federal habeas proceedings.

Petitioner parries this argument by asserting that since a bill in equity in aid of an action at law was a tactic utilized to obtain discovery in civil cases, then this procedure provided a means of obtaining discovery in habeas corpus (Petitioner's Brief, p. 32). Not a single authority on equity practice which we have examined suggests that a bill of discovery could be brought in aid of a habeas corpus petition.[42] In fact,

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[41] In *Fay v. Noia,* 372 U.S. 391, 438 (1963), this Court declared, "[H]abeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi,* 344 U.S. 561, 573 (dissenting opinion)." In *United States ex rel. Smith v. Baldi,* 344 U.S. 561, 573 (1953), in his dissenting opinion, Justice Frankfurter observed:

> "I need hardly point out that in a court of equity causes are disposed of on the facts as they appear at the time of the disposition, and that habeas corpus is certainly to be governed by the rules of fairness enforced in equity."

Were habeas corpus a federal equitable remedy, these distinctions between the practice in habeas and that in equity would have been unnecessary.

[42] J. ADAMS, EQUITY 79-82 (8th ed., Ralston rev., 1890); G. BISPHAM, EQUITY §§ 556-65 (10th ed., McCoy rev., 1925); 2 E. DANIELL, CHANCERY PLEADING AND PRACTICE 1537-39 (6th Am. ed., Gould rev., 1894); J. EATON, EQUITY JURISPRUDENCE §§ 323-31 (2d ed., Throckmorton rev., 1923); N. FETTER, EQUITY JURISPRUDENCE

there were some limitations upon the bill which seem to preclude its use in habeas corpus.[43] But assuming that the bill was technically available, it is nevertheless obvious that it was completely unsuitable in habeas corpus.

Under the old Equity Rules, there were only two provisions involving any sort of discovery before trial. Sunderland, *The New Federal Rules,* 45 W. VA. L. Q. 5, 19 (1938). The first of these, Rule 47, allowed pre-trial depositions in exceptional cases, thus permitting "accidental" discovery. *Ibid.*

> "Rule 47 authorized the taking of depositions of named witnesses for use at the trial for good and exceptional cause for departing from the general rule, the general rule being 'no depositions.' The purpose here was not discovery but obtaining proof." *Id* at 20.

Consequently, Rule 47 was not appropriate for discovery, and in fact provided for nothing more than an evidentiary deposition. Evidentiary depositions are now provided for in the Habeas Corpus Act. 28 U.S.C. § 2246 (1964).

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§ 197 (1895); W. FLETCHER, EQUITY PLEADING AND PRACTICE §§ 804-24 (1902); E. MERWIN, EQUITY §§ 848-65 (H. Merwin ed. 1896); 1 J. POMEROY, EQUITY JURISPRUDENCE § 196 (5th ed., Symonds rev., 1941); 3 J. STORY, EQUITY JURISPRUDENCE §§ 1927-68 (14th ed., Lyon ed., 1918); J. STORY, EQUITY PLEADINGS §§ 311-25 (10th ed., Gould rev., 1892); see also authorities cited in note 38, *supra* at 62.

[43]A bill of discovery in aid of an action at law was not entertained where the controversy involved "moral turpitude" or arose "from acts clearly immoral." 1 J. POMEROY, EQUITY JURISPRUDENCE § 197 at 295 (5th ed., Symonds rev., 1941). Certainly the criminal acts which serve as the basis for a conviction would be "acts clearly immoral."

The other equity provision was Rule 58 which did permit pre-trial discovery and was the only discovery procedure available before adoption of the Federal Rules.

> "Equity Rule 58 is the only provision in the entire federal system intended for discovery. That rule provided for three things, general discovery, discovery of documents and admissions. . . .
>
> ". . . Equity Rule 58 is very restricted in its scope. It was available only to ascertain facts relating to the party's own case, not those of his adversary's case. . . . *It is nothing, in fact, but the discovery available under the old chancery bill of discovery.* . . .
>
> "Further, Equity Rule 58 was very restricted as to the class of deponents; only parties could be interrogated, not mere witnesses." Sunderland, *supra,* 45 W. VA. L. Q. at 20-21 (emphasis added).

The old bill of discovery was narrowly restricted in scope and utility.

> "In the common-law courts, prior to the modern statutory legislation, a party could not be examined as a witness. . . . It was to supply this grievous defect in the ancient common-law methods that equity established the first branch of its auxiliary jurisdiction, called discovery." 1 J. POMEROY, EQUITY JURISPRUDENCE § 190a at 274-75 (5th ed., Symonds rev., 1941).

Without discovery through a proceeding in equity, then, neither party could either give evidence or be examined. But ordinary witnesses were always compe-

tent to testify. Thus it was the rule that "a bill of discovery cannot be brought against one who is not a party in the original suit, but who is merely a witness, and may be examined as such." E. MERWIN, EQUITY § 865 (H. Merwin ed. 1896); accord, W. FLETCHER, EQUITY PLEADING AND PRACTICE § 808 at 861 (1902); 3 J. STORY, EQUITY JURISPRUDENCE § 1947 (14th ed., Lyon ed., 1918). Similarly, under Equity Rule 58, discovery could not be directed against mere witnesses. Sunderland, *supra*, 45 W. VA. L. Q. at 21.

The limited function of a "bill of discovery" as embraced in Equity Rule 58 also explains why it was never used in a habeas proceeding. The responding party in a habeas case has always been the custodian, and he offered no evidence, other than to present to the court the basis of detention, usually in the form of the judgment or warrant. It is apparent that the reason there are no cases granting a bill of discovery in aid of a habeas corpus proceeding, and no texts suggesting such a practice, is because it would have served no useful purpose: the bill could only have been directed against the custodian, and he was already required to show the basis of detention. This aspect of habeas practice is now covered by section 2243.

Before a practice sanctioned in the Federal Rules of Civil Procedure can be applied to habeas corpus, Rule 81(a) (2) requires that that practice conform to habeas practice prior to the adoption of the Rules. No case or text indicates that discovery procedures could be utilized in habeas proceedings prior to the Rules.

Anaylsis compels the conclusion that this silence is due to the fact that the prior discovery practice was wholly unsuited to the habeas corpus proceedings. Certainly the type of discovery sought here never existed in habeas practice prior to adoption of the Civil Rules in 1938. Consequently, the second criterion of Rule 81(a) (2) cannot be satisfied either.

The various authorities upon which petitioner relies do not suggest a contrary result (Petitioner's Brief, pp. 23-24, 28, 31).[44] None of them considered the legislative history of the habeas corpus exclusion, nor did they attempt to examine the practice at issue in light of the statutes and prior practice as is required by Rule 81(a) (2). Those cases which apparently assumed that the Rules apply are hardly authority for the proposition that the Federal Rules govern habeas corpus, especially in view of Rule 81 (a) (2).[45] Nor are those decisions which rested upon

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[44]Some of petitioner's "authorities" are totally inapposite. *United States ex rel. Tillery v. Cavell*, 294 F.2d 12, 18 (3rd Cir. 1961), cert. denied, 370 U.S. 945 (1962), applied Rule 60(a) (correction of clerical errors) in the context of an appeal. But the Civil Rules *did* apply to habeas corpus appeals under former Rule 81(a)(2). Other cases which have utilized the Rules on appeal are equally inapt. See *Williams v. Babineaux*, 357 F.2d 481, 482 (5th Cir. 1966); *O'Keith v. Johnston*, 129 F.2d 889, 891 (9th Cir.), cert. denied, 317 U.S. 681 (1942); *Macomber v. Hudspeth*, 115 F.2d 114, 116 (10th Cir. 1940), cert. denied, 313 U.S. 558 (1941). Petitioner also relies upon *Harris v. North Carolina*, 240 F.Supp. 985, 989-90 (E.D. N.C. 1965), for the proposition that discovery interrogatories may be used in habeas corpus. However, a careful reading of the case indicates that the interrogatories were used as provided in section 2246 to test evidence submitted in affidavit form. See *id.* at 990.

[45]*Fortner v. Balkcom*, 380 F.2d 816, 818, 820-21 (5th Cir. 1967); *Molignaro v. Dutton*, 373 F.2d 729, 730 (5th Cir. 1967); *Rogers v. Bennett*, 320 F.2d 83, 86 (8th Cir. 1963); *Sullivan v. Dickson*, 283 F.2d 725, 727 (9th Cir.), cert. denied, 366 U.S. 951

the classification of habeas corpus as a "civil action" particularly persuasive.[46] Habeas corpus is actually *sui generis*, and "the uselessness of relying on the historical label of habeas corpus as a 'civil' proceeding . . . has been noted before." *Wilson v. Weigel*, 387 F.2d 632, n. 2 at 634 (9th Cir. 1967), citing *Sullivan v. United States*, 198 F.Supp. 624 (S.D. N.Y. 1961) (containing an excellent discussion of the "civil" analogy). Furthermore, Rule 81(a) (2) clearly establishes that habeas corpus cannot be con-

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(1961); *Hammerer v. Huff*, 110 F.2d 113, 115 (D.C. Cir. 1939); *Bowen v. Boles*, 258 F.Supp. 111, 113 (N.D. W.Va. 1966); *United States ex rel. Bruno v. Herold*, 39 F.R.D. 570, 572 (N.D. N.Y.), rev'd on other grounds, 368 F.2d 187 (2d Cir. 1966); *Smith v. United States*, 174 F.Supp. 828, 830, 835 (S.D. Cal. 1959), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960); *Hamilton v. Hunter*, 65 F.Supp. 319, 320 (D. Kan. 1946). As this Court has previously noted, a case does not sanction a procedure where it is not at issue and "passed without notice." *Holiday v. Johnston*, 313 U.S. 342, 352 (1941).

[46] *Schiebelhut v. United States*, 318 F.2d 785, 787 (6th Cir. 1963); *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 61-64 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963); *Bowdidge v. Lehman*, 252 F.2d 366, 368 (6th Cir. 1958); *Estep v. United States*, 251 F.2d 579, 581-83 (5th Cir. 1958); *In re McShane*, 235 F.Supp. 262, 266 (N.D. Miss. 1964). Of these decisions, *Schiebelhut* is particularly weak for it relied upon an unpublished opinion involving the same petitioner wherein certiorari had been denied. *Schiebelhut v. United States, supra.* In his opposition to the petition for certiorari, the denial of which appears at 361 U.S. 973 (1960), the Solicitor General noted that the procedure adopted by the district court was intended to require the petitioner to clarify his petition and set out his allegations with greater specificity. Solicitor General's Brief in Opposition to Petition for Certiorari in *Schiebelhut v. United States*, No. 437 Misc., Oct. Term, 1959, at 4-5. The Solicitor General also suggested that the Civil Rules did not apply to section 2255 cases because of the exclusionary provisions of Rule 81(a)(2). *Id.*, n. 3 at 5. Insofar as *In re McShane, supra*, purports to utilize Rule 56 (summary judgment) to implement section 2243, it is also incorrect. The summary judgment procedure does not comport to that envisioned by this Court in *Walker v. Johnston*, 312 U.S. 275, 284-86 (1941).

sidered an ordinary civil action. *Knowles v. Gladden,* 254 F.Supp. 643 (D. Ore. 1965), simply misinterpreted section 2246. See Argument II, *supra* at pp. 19-22.

Many of the cases cited by petitioner are the mutant progeny of *Hunter v. Thomas,* 173 F.2d 810 (10th Cir. 1949). In *Hunter,* it was held that Rule 59 (motion for a new trial) could be applied to habeas corpus proceedings. After quoting Rule 81(a) (2) in a footnote, the court reasoned as follows:

> "There is nothing . . . [in the habeas corpus statutes] which provides any procedure with respect to a new trial in a habeas corpus proceeding. Prior to the adoption of the Federal Rules of Civil Procedure, it was settled that a court could vacate an order discharging the petitioner on habeas corpus at any time during the term at which the order was entered.[3] Habeas corpus is a civil proceeding. . . . It would seem, therefore, that the provisions of Rule 59, applicable to cases tried without a jury, govern motions for a new trial in a habeas corpus proceeding." *Id.* at 812.

Footnote 3 referred to a habeas corpus case, *Tiberg v. Warren,* 192 F. 458, 462-63 (9th Cir. 1911), decided long before adoption of the Federal Rules, in which it had been determined that a new hearing could be ordered in a habeas corpus proceeding upon a showing of good cause therefor. The *Hunter* decision, then, went through the same analytical process as the Ninth Circuit in the case below, *Wilson v. Harris,* 378 F.2d 141, 143 (9th Cir. 1967), and determined that: (1) motions for a new trial were not otherwise provided for in the habeas corpus statutes, and (2)

motions for new trial had been permitted in habeas corpus proceedings prior to adoption of the Federal Rules. Therefore, the *Hunter* case properly applied Rule 59 to habeas corpus proceedings.

The cases which followed *Hunter,* however, overlooked this analysis and consequently misinterpreted the result. *Bowdidge v. Lehman,* 252 F.2d 366, 368 (6th Cir. 1958), cited *Hunter* for the proposition that "habeas corpus is a civil proceeding governed by the Federal Rules of Civil Procedure. . . ." *United States ex rel. Seals v. Wiman,* 304 F.2d 53, 64 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963), quoted this statement from *Bowdidge,* including the citation to *Hunter,* and reached the same conclusion. In *Abel v. Tinsley,* 338 F.2d 514, 516 (10th Cir. 1964), some 15 years after *Hunter,* an astounding mutation occurred. The court there reasoned that because *United States ex rel. Seals v. Wiman* (discussed *supra*) had applied Rule 36, *Macomber v. Hudspeth* (discussed *infra*) had applied Rule 52, *Bowdidge v. Lehman* had applied Rule 56, and *Hunter v. Thomas* had applied Rule 59, then Rule 60 had to apply too. The patent fallacy of this logic appears when the premises from which *Abel v. Tinsley* reasons are examined. *United States ex rel. Seals v. Wiman* assumed that the Federal Rules applied because habeas corpus is "civil" in nature, and also misinterpreted *Hunter. Bowdidge* cited *Hunter,* but ignored the analysis therein. And *Macomber v. Hudspeth,* 115 F.2d 114, 116 (10th Cir. 1940), cert. denied, 313 U.S. 558 (1941), held that Rule 52 applies to habeas corpus *appeals;* a result clearly commanded by former Rule 81(a) (2) and

having nothing to do with the applicability of the Rules in the district courts. Therefore these post-*Hunter* cases stand more as an unexpected example of Mendel's laws than as a proper interpretation of the Federal Rules.

Petitioner also cites *Knowles v. Gladden,* 254 F. Supp. 643, 644-45 (D. Ore. 1965), and *Smith v. United States,* 174 F. Supp. 828, 830, 835 (S.D. Cal. 1959), appeal dismissed as untimely, 272 F.2d 228 (9th Cir. 1959), cert. denied, 362 U.S. 954 (1960), as authority for the proposition that discovery techniques have been recently authorized by courts invoking the Federal Rules.[47] Of course, the *Knowles* decision is in conflict with three other cases: *Wilson v. Weigel,* 387 F.2d 632 (9th Cir. 1967); the decision below, *Wilson v. Harris,* 378 F.2d 141 (9th Cir. 1967); *Sullivan v. United States,* 198 F.Supp. 624 (S.D. N.Y. 1961). Similarly, there is also a case which is contrary to the *Smith* decision: *United States v. Burdette,* 161 F.Supp. 326, 331 (E.D. Mich. 1957), aff'd, 254 F.2d 610 (6th Cir. 1958), cert. denied, 359 U.S. 976 (1959). In any event these cases are irrelevant, for they were decided at least twenty years after the Federal Rules had been adopted and thus cannot be classified as the "practice" in habeas corpus cases prior to 1938 as is required under Rule 81(a) (2).

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[47]The fundamental error in *Knowles v. Gladden* has already been demonstrated. See Argument II, *supra* at pp. 19-22. *Smith v. United States* is also of dubious value since Rule 35 was merely assumed to apply. See notes 22 and 45, *supra,* and accompanying text.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals should be affirmed.

Dated, October 25, 1968.

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(Appendix Follows)

Appendix

UNITED STATES CODE—TITLE 28

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgement of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been

denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, the same shall be attached to the return to the writ, or to the answer to the order to show cause.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

§ 2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or

judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the

the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is

produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such per-

tinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1.

SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 33.

INTERROGATORIES TO PARTIES

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written

objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Rule 81(a)(2).

These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

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1 Criminal No. 4543

People of the State of California,
Plaintiff and Respondent,

vs.

Alfred Walker,
Defendant and Appellant.

OPINION
(Not to be Published)

Defendant Alfred Walker appeals from a judgment convicting him of possession of marijuana for sale, in violation of Health and Safety Code, section 11530.5, with two prior felony convictions.

At approximately 12:30 p.m. on August 9, 1963, Edward Hilliard, an Oakland police officer attached to the Vice Control Section, received a telephone call from a female informant. The officer had known the informant, a special employee of the section, for two years. He considered her a reliable informant and testified that she had previously furnished him with

information leading to the arrest and conviction of at least one person.

On this occasion, the informant reported that she had met a man who had just come to Oakland from San Francisco and who had five bags of marijuana for sale. Although she did not know the man's name, she stated that he had taken Room 3 at the Dunbar Hotel, and that he intended to sell the marijuana as soon as possible and return to San Francisco.

Upon receiving this information, Hilliard instructed the informant to meet him near the Dunbar Hotel. He and Officer Walker then proceeded to the agreed location, furnished the informant with a $20 bill, the serial number of which had been recorded, and instructed her to go to Room 3 of the hotel and attempt to make a purchase of marijuana from the person in question. No attempt to search the informant was made.

The informant then drove to the hotel in her own car, with the officers following at a distance in another car. She entered the hotel and remained out of sight of the officers for approximately five minutes. Upon emerging from the hotel, she got into her car and drove to a prearranged spot, with the officers following. She then gave Hilliard a brown paper bag containing a vegetable substance which he took to be marijuana. The informant stated that she had purchased the bag from the man who was in bed in Room 3. She further stated that he had taken it from a larger bag which was under the mattress and which contained several other small bags. The officers did

not search the informant to see if she still had the $20 bill in her possession.

The officers then returned to the Dunbar Hotel, and Hilliard proceeded to Room 3 while Walker remained on the street where he could observe the window of said room. After Hilliard had knocked repeatedly on the door of the room without receiving any response, he went to the hotel manager's room to obtain a key. The manager then accompanied Hilliard and Walker to Room 3 and unlocked the door. Appellant was asleep in bed. Hilliard awakened him and identified himself as a police officer. Upon observing certain scars on the inside of appellant's elbows, Hilliard inquired as to their nature, and appellant replied that he had been using Percodan, a synthetic narcotic, for the last five days. Upon further questioning, he admitted that he had obtained the Percodan without a prescription. When asked whether he had Percodan or the equipment for injecting it in the hotel room, appellant replied in the negative, stating that he had used it up. The officer then asked if he could look around the room, and appellant replied, "Sure, go ahead and look. There is nothing here."

After placing appellant under arrest for the illegal use of narcotics, Hilliard lifted the mattress on the bed and recovered a brown paper bag which contained four small bags, three cigarettes, and a package of wheat straw papers. The cigarettes and the contents of the four small bags were subsequently analyzed and found to be marijuana. When Hilliard showed

these items to appellant, he stated that he had discovered the large bag under the mattress when he rented the room. When asked what he intended to do with it, he replied that he wanted to sell it to make some money. Although appellant was searched by the officers, the $20 bill which had been given to the informant was never found.

Appellant testified that he lived in Berkeley, but had gone to San Francisco by bus on the evening preceding his arrest in order to see a friend about a job. He had taken two Percodan tablets before leaving for San Francisco. After arriving in San Francisco, appellant met his friend and talked with him until 8:30 or 9:00 a.m. on the following morning. He then encountered the informant, who was known to him by sight, and offered her 50 cents to drive him to Oakland, where he intended to meet with another friend who lived one block from the Dunbar Hotel. The informant agreed and, after driving appellant to Oakland, suggested that he rent a room at the Dunbar Hotel and get a bath and some sleep. Appellant entered the hotel with the informant, who asked the clerk for Room 3 and signed the register as "Mr. and Mrs. Johnny Joseph." After appellant had paid the clerk $3, the informant accompanied him to Room 3 and looked around to see that everything was in order. She then left to obtain more towels, but never returned to the room. Appellant took a bath and then went to sleep in the bed. He heard no knock on the door and awoke only when Hilliard shook him. He denied ever having seen the large brown bag or its contents until it was removed

from under the mattress, and also denied having made any statement to the contrary. He further stated that he had only 17 cents left after paying for the room, that this was the total amount taken from him after his arrest, and that he had no $20 bill in his possession.

Appellant does not challenge the sufficiency of the evidence, but contends that the judgment should be reversed because evidence that was obtained by an illegal search and seizure was erroneously admitted. He asserts, more specifically, that he never gave his free and voluntary consent to the search of his hotel room, and that said search cannot be deemed incidental to a lawful arrest because the police lacked reasonable cause for such arrest and relied solely upon information supplied by an informant who was not searched before and after she allegedly purchased marijuana from appellant and who was not kept under constant surveillance so as to exclude the possibility of her having obtained it from another source.

This argument is wholly without merit, and is apparently based upon the erroneous assumption that evidence of information supplied by an informant cannot constitute reasonable cause for an arrest unless such evidence is in itself sufficient to support a conviction.

It is settled that information from a reliable informant is sufficient to sustain a finding that an arrest was made with reasonable cause and that such information need not be confined to evidence which would be admissible at the trial on the issue of guilt.

(People v. Prewitt (1959) 52 Cal.2d 330, 337; People v. Gonzalez (1956) 141 Cal.App.2d 604, 606[1]; Trowbridge v. Superior Court (1956) 144 Cal.App.2d 13, 17.) In the present case, Officer Hilliard testified that the informant had served as a special employee of the Oakland Police Department for two years, that he considered her reliable, and that she had in the past provided information which led to the arrest and conviction of at least one person. Under such circumstances, the officer's failure to search her before and after she entered the hotel and to keep her under surveillance at all times did not render valueless the information furnished by her. In view of her known reliability, the officer was clearly justified in believing the information which she gave him and in arriving at the reasonable conclusion that the occupant of Room 3 was offering marijuana for sale. Since the officer accordingly had reasonable cause for arresting appellant (Pen. Code, § 836), it follows that a search incidental to such arrest was entirely proper (People v. Dixon (1956) 46 Cal.2d 456, 458-459), and it is unnecessary to determine whether appellant freely consented thereto.

Judgment affirmed.

Shoemaker, P. J.

We concur:

Agee, J.

Taylor, J.

Filed October 15, 1964,
Lawrence R. Elkington, Clerk.

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[1]Disapproved on other grounds in Priestly v. Superior Court (1958) 50 Cal.2d 812, 819.